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ERRATA

On page 51, in the second paragraph *add* the word 'C' between the words 'Desai' and 'J.', in the third paragraph *read* Mukerji *for* Mulla and *delete* the words 'Dwivedi, J.' printed on the margin.

On page 361, in the third line of fourth paragraph *read* 'is' *for* the word 'as' printed between the words 'division' and 'to all'.

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1961

Chief Justice:

The Hon'ble M. C. DESAI

Judges:

The Honourable Mr. Justice V. BHARGAVA.

The Honourable Mr. Justice NASIR ULLAH BEG.

The Honourable Mr. Justice BASUDEVA MUKERJI.

The Honourable Mr. Justice A. N. MULLA.
(Retired on 24-10-'61)

The Honourable Mr Justice V. G. OAK.

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The Honourable Mr. Justice JAGDISH SAHAI

The Honourable Mr. Justice BISHAMBHAR DAYAL.

The Honourable Mr. Justice J. N. TAKRU.

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The Honourable Mr. Justice K. P. MATHUR.

The Honourable Mr. Justice J. D. SHARMA.

The Honourable Mr. Justice MITHAN LAL.

The Honourable Mr. Justice T. RAMABHADRAN.

The Honourable Mr. Justice S. D. SINGH.
(Took his seat on 3-8-'61).

The Honourable Mr. Justice S. C. MANCHANDA.
(Took his seat on 16-8-'61).

The Honourable Mr. Justice BRIJ LAL GUPTA.

The Honourable Mr. Justice BHAGWAN DAS GUPTA.
(Took his seat on 22-8-'61).

The Honourable Mr. Justice K. B. ASTHANA.
(Took his seat on 23-8-'61).

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Adulteration of milk—*Sale of mixture of cow and buffalo milk—Absence of a prescribed standard for the mixture—Adulteration, how adjudged—Scope of duty of public analyst defined—Prosecution for second offence—Trial as a summon's case, legality of—Prevention of Food Adulteration Act,* 1954, *ss.* 2(ix)(1), 7 *and* 16(1)(a)*—Prevention of Food Adulteration Rules,* 1955, *rr. A.* 11-01, *A* 11. 01 01, *A.* 11. 01.02.

Where there is no standard prescribed for any article of food, it is the duty of the court to fix or determine the same.

Although the law had prescribed a standard for cow and buffalo milk separately there is no such standard for a mixture of the two where a proportion of the two in the mixture is known, the prescribed standard for that mixture may be worked out by a simple arithmetical calculation. Even where the proportion is not known it may be possible to adjudge adulteration in certain cases, e.g. where the quantity of milk fat or non-fatty

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solids is less than the minimum prescribed for cow milk it amounts to or can only be the result of adulteration

It is time the public analyst clearly understood the scope of his duty and confined himself to what lay within it. The public analyst should state in his report merely the result of his analysis and leave it to the Court to determine what is the prescribed standard for the particular article of food and whether the quality or purity of the sample falls below the prescribed standard, and that if he can determine the quantity of water in the sample without determining the quantity of solids he should state the quantity of water actually found in the sample, leaving it to the Court to determine how much, if at all was added water

The second offence punishable under s. 16(1)(i) of the Act being liable to the maximum sentence of two years' imprisonment must be tried as a warrant case. The trial of such offences according to the procedure for summons case is illegal but curable under s. 537 of the Code of Criminal Procedure except where prejudice has been caused to and established on behalf of the accused

Prem Das v. State 229

Appeal to Supreme Court—*Order on remand for de novo trial, whether subject to and fit for appeal—Constitution of India, 1950, Article 133(1)(c)—Code of Civil Procedure, 1908, s 109(1)(c).*

An order of remand for a *de novo* trial is not a judgment, decree or final order within the meaning of Article 133 of the Constitution and is, therefore, unappealable to the Supreme Court. The inconsistency (re the finality of the Order) between s. 109 of the Code of Civil Procedure and Article 133 of the Constitution was removed by the Civil Procedure Code Amendment Act, 1955. But even before the Amending Act, the provisions under the Code being expressly made subservient to those in the Constitution, the position was in effect the same

The observation of the High Court on a point remanded for retrial which would not be binding in the *de novo* trial cannot be said to raise a question of law of great public or private importance so as to justify a certificate of fitness for appeal to Supreme Court under Article 133(1)(c) of the Constitution

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Appeal to Supreme Court, *from an order dismissing petition for certiorari and mandamus—Certificate for leave to appeal*

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granted by the High Court-Power of High Court to grant interim relief to petitioner-appellant—Constitution of India, 1950, Art 133(1) (c)-Code of Civil Procedure, 1908, O XLV, r. 13 and s. 151

Consequent to the nationalisation of transport service and the cancellation of his licence on a particular route, the petitioner moved the High Court for *certiorari* quashing the relevant notifications of the Government and for *mandamus* restraining the State authorities from interfering with his right to ply on the said route. The petition being dismissed, the petitioner prayed for and was granted leave to appeal to Supreme Court under Art 133(1) (c) of the Constitution. In a petition to the High Court for an interim relief restraining the State authorities from interfering with his right to ply on the route:

Held, (per majority, B. DAYAL, J *contra)* that the High Court had no power to grant interim relief in such cases either under O XLV, r. 13 or s 151 of the Code of Civil Procedure

The only provision in O. XLV, r 13 which could be invoked in such a case was sub-rule (2) *(d)* but the first part of this sub-rule does not obviously apply because the respondent is not seeking the assistance of the Court and cannot, therefore, be placed under any condition The second part of the sub-rule is equally inapplicable since the subject-matter of the appeal is the refusal of the High Court to issue the writ or the right claimed or wrong complained of which is not amenable to any interim direction

Since the subject is exhaustively dealt with and excluded from the provisions made under O. XLV, r 13 s 151 cannot be invoked in this case.

(Per B. DAYAL, J.)—The subject-matter of the appeal in this case is the petitioner's right to ply the bus and is covered by the second part of sub-rule (2) *(d)* of O XLV, r 13 and the High Court has, therefore, the power to issue the interim direction

Since the power is specifically prescribed for under the aforesaid sub-rule, there is no need or scope for the availability of s. 151 of the Code

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——*from an order of acquittal passed or maintained by the High Court in a criminal proceeding—Whether covered by or competent under cl. (c) of Art. 134(1) of the Constitution —Constitution of India, 1950, Art 134(1) (c).*

Clause (c) of Art. 134(1) of the Constitution provides for appeal to the Supreme Court from any judgment, final order or sentence in a criminal proceeding of a High Court if the High Court certifies that it is a fit case for appeal to the Supreme Court. An order of acquittal passed or maintained by the High Court is covered by and equally appealable under cl. (c). There is nothing in Art. 134 or any law in force in India to restrict appeals under cl. (c) or the power of the High Court

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to grant the requisite certificate under or for the same to judgment, final order or sentence of conviction passed or maintained by the High Court.

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Arbitration Act, 1940, ss. 3 and 28, First Sch. r. 3—Reference of dispute for decision by Arbitration—Time within which award must be filed—Computation of 469

Arbitration—*Reference of, dispute for decision by—Time within which award must be filed—Computation of—Arbitration Act,* 1940, *ss. 3 and 28, First Sch. r. 3.*

Rule 3 of the First Schedule to the Arbitration Act, by virtue of s. 3 and in the absence of a different intention expressed in the arbitration agreement, limits the time within which the award must be made by the arbitrators.

(*Per* majority)—The second alternative, viz, "The arbitrators shall made their award within four months. . . . after having been called upon to act by notice in writing by any party to the arbitration agreement. . ." can be invoked in a case where notice to act has been given to the arbitrators. Such a notice may be given (i) either before they entered on the reference, or (ii) even after but within four months from the date they entered on the reference. The period of four months would, in the former, be computed from the date of entering on the reference and, in the latter, from the date of notice to act. A notice to act need, obviously, be given only when an arbitrator is not acting, i.e. he has refused or neglected to discharge his duty. The court has in every case, the power to extend the time even though the award has been factually made beyond the prescribed time.

(*Per* DAYAL, J.)—The period of four months in question is to run from the date of the arbitrators entering on the reference or from the date of the notice to act. R. 3 does not contemplate of a notice on the arbitrators to act after they once enter on the reference and the period of four months cannot be computed from or extended by such notice.

Hari Shanker Lal v. Shambhu Nath 469

Attachment of movables—*Custody of goods attached—Attaching Officer entrusting custody to* supardar *who keeps them in the enclosure of the decree-holder—Legality and nature of decree-holder's custody—Removal of goods with use of force by the owner—Liability of the owner—Code of Civil procedure,* 1908, *O. XXI, r.* 48 *and r.* 116 *framed by Allahabad High Court—Indian Penal Code,* 1860, *ss.* 424, 24 *and* 23.

Under O. XXI r. 48 read with r. 116 framed by the Allahabad High Court under the Code of Civil Procedure, it is competent for the Attaching Officer to keep the goods in the custody of a *supardar* and for the latter to entrust it to the decree-holder. Decree-holder would in such a case, be the bailee of

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the *supardar* and his possession would be on behalf of or as agent of the court.

Where a property has been legally attached by a court, its possession passes from the owner to the court or its agent. If the owner, during the subsistence of attachment resorts to force and takes back possession of the property, he acts unlawfully and causes wrongful loss to the court. His act, therefore, amounts to dishonest removal of property and is punishable under s. 424 of the Penal Code.

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Carriage by rail—*Non-delivery of goods to the consignee whether covered by expression or cause loss, destruction* or *deterioration of goods—Condition precedent of preferring the claim for compensation within the prescribed time, whether attracted—Indian Railways Act,* 1890 *s.* 77.

Failure to deliver the goods to the consignee is covered by the expression or cause loss, destruction or deterioration of goods' under s. 77 of the Railways Act and cannot, therefore, be decreed unless the claim is preferred with the Railway Admintration within six months from the date of delivery of goods for carriage.

The provisions of Articles 30 and 31 of the Limitation Act prescribing limitation respectively for suits for 'loss or injury to' and 'non-delivery or delay in delivery of goods cannot be projected over the provisions of s. 77 of the Railways Act so as to hold that loss because of non-delivery of goods does not fall under that section.

Governor-General-in-Council *v.* Musaddi Lal 1

Chancellor's power or order of reference—in disputes as to Constitution of University authorities or bodies—Whether judicial and to be exercised in compliance with the principles of natural justice. 634

Charge framed by the Committing Magistrate—*Power of the Sessions Court to withdraw or drop the same—Code of Criminal Procedure,* 1898, *ss.* 226 *and* 227—*Indian Penal Code,* 1860, *ss.* 109, 210, 218 *and* 219.

Prosecution of Sarpanch of Nyaya Panchayat—Sanction of State Government—Whether and when necessary—Code of Criminal Procedure, 1898, *s.* 197—*Indian Penal Code,* 1860, *s.* 19.

The Sessions Court has no power to withdraw or drop altogether a charge framed by the Committing Magistrate.

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Its power under s. 226 or 227 of the Code of Criminal Procedure is limited to altering or adding to the charges so framed.

[One of the accused was committed on a charge under s. 219 and the other under s 210/109 and the Sessions Court changed them under ss. 218 and 210, respectively].

The Sarpanch of a Nyaya Panchayat is a judge as defined under s. 19 of the Penal Code and as such comes within the provisions of s 197 of the Code of Criminal Procedure. The protection of s. 197 is, however, limited only to those who hold such office at the time the complaint is filed; the holding of such office at the time the act complained of was committed being immaterial for this purpose.

Kishan Swarup v. Thakur Brijendra Singh ... 682

Code of Civil Procedure, 1908, s. 11 *and O. II, r. 2—Plea of res judicata when available—Bar under O. II, r. 2, nature and scope of.*

In the appeal the main legal pleas raised were that the suit was barred by the principle of *res judicata* and O. II, r. 2, C. P. C.

The court after considering these pleas *held*: (i) that where the bar of r. 2 of O. II, Code of Civil Procedure was pleaded one had to see what gave occasion to and was the foundation of one suit and what was the occasion and foundation of the other suit and also whether when the first suit was filed on the alleged cause of action then could that alleged cause of action enable the man to seek the remedy which he had sought by the second suit;

(ii) that in order to attract the bar of r 2 of O II Code of Civil Procedure what had to be determined was whether what formed the foundation of the suit and enabled the plaintiff to seek his relief could entitle the plaintiff to seek a larger relief which could include the relief which was sought by the second suit;

(iii) that in a certain sense the bar of r. 2 of O II Code of Civil Procedure was in *pari materia* with the bar created by s. 11 of the Code and certain other bars which could be pleaded under the generic head of 'estoppel';

(iv) that a bar of O. II, r. 2, Code of Civil Procedure was not really a matter of substance but was one of procedure though there appeared adequate reason for sustaining such a procedural bar;

(v) that the plea of *res judicata* could only be available if it could be held that the matter in the two suits was directly and substantially in issue in both the suits or that any matter which might and ought to have been made the ground of defence or attack in the former suit had been omitted.

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By s. 12-C, U. P. Panchayat Raj Act a Sub-Divisional Officer has in the matter of (i) hearing of an election petition and the procedure to be followed at such hearing, (ii) setting aside an election or declaring the applicant to be duly elected, or any other relief that may be granted to the petitioner, such powers and authority as may be prescribed

Rule 25 of the Rules framed under the Act provides that an election petition is to be tried in accordance with the procedure applicable under the Code of Civil Procedure to the trial of suits.

Where the petitioner in an election petition challenging the election of a Pradhan prayed for an interim relief that the petitioner may not be removed from office of Pradhan which he had been holding and the charge may not be transferred from him, the Sub-Divisional Officer refused the prayer on the ground that he had no jurisdiction to stay transfer of charge.

On a petition filed by the petitioner under Art. 227 of the Constitution of India challenging the order of the Sub-Divisional Officer *inter alia* on the grounds that he had the jurisdiction to grant the relief under s. 151 and O. XXXIX. Code of Civil Procedure and further that it had the power to do so under the principles of implied power:

Held, that the Code of Civil Procedure prescribes the procedure for the trial of suits and also confers various incidental powers upon the courts trying the suits. Rule 25 of the U. P. Panchayat Raj Rules, makes only those provisions of the Code of Civil Procedure applicable to the hearing of election petitions which relate to the trial of suits. It does not confer upon the Sub-Divisional Officer all the powers that are conferred upon a court by the Code of Civil Procedure.

The expression "procedure applicable to the trial of suits" in rule 25, does not include a power to issue an injunction or grant a stay order.

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There, exists, a distinction between 'procedure' on the one hand and 'power', 'jurisdiction' and 'authority' on the other.

An election petition being a purely statutory proceeding unknown to common law, such powers as are contained under s. 151 and O. XXXIX, Code of Civil Procedure can be exercised by an election tribunal only if they have been conferred upon it by a statute. There being no provision in the U. P. Panchayat Raj Act conferring such powers on the Sub-Divisional Officer he could not exercise them.

The inherent power of court to do justice and to pass any orders which it considers necessary in the interest of justice irrespective of whether express provisions of the laws of procedure provide for it or not, is also not available to an election tribunal in that it is not a court and possesses no common law powers. An election tribunal can pass only such orders as the provisions of the Act under which it is created, provide for.

The principle of implied power which authorises the doing of all things necessary for the enforcement of an order refers to the execution of an order already passed. It does not refer to a power to be exercised in anticipation of an order which may subsequently be passed. The power of the Sub-Divisional Officer to declare a vacancy or declare the petitioner to be duly elected does not mean that before such a declaration is made he can direct the petitioner to remain in office or restrain the opposite-party from performing his duties.

The Sub-Divisional Officer consequently had no jurisdiction to stay the transfer of charge pending the disposal of the election petition.

The petition was accordingly dismissed.

Rameshwar Dayal *v.* Sub-Divisional Officer, Ghatampur ... 298

——s. 109(1)(*c*)—Order of remand for *de novo* trial, whether subject to and fit for appeal to Supreme Court. 7

——s. 152—*Application for amendment of decree—Decree affirmed in appeal—Merger of decree—Which court has power to amend the decree.*

Held, the proper court for making the application under s. 152 in cases when an appeal has been decided on merits and the decree of the lower court has merged into the appellate decree, would be the appellate court and not the trial court.

Once a decree is affirmed by the High Court it merges into the decree of the High Court and it is no longer open to the lower court to vary that decree by way of review.

Deba Nand Naithani *v.* Jayanand ... 486

——s. 152, O. XX, r. 6 and O. XXII, r. 5—Substitution of Legal representative of the sole plaintiff—Application for,

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filed but no order of the court—Effect of the decree passed in the name of the deceased plaintiff and of the amended decree—Suit, whether may be deemed as still pending. 663

———O. XXI, r. 43 and r. 116 framed by Allahabad High Court —If, it is competent for the attaching officer to keep the goods in the custody of a *supardar* and for the latter to entrust it to the decree-holder. 13

———O. XXXII, rr. 6 and 7—application of, in execution of decree for partition in favour of a joint Hindu family including minor sons. 26

———O. XL, r. 1—Duration of office of receiver in a suit—Lease by receiver—Summary jurisdiction of court to evict the lessee. 389

Code of Criminal Procedure, 1898, *ss.* 9, 435—*Court of Assistant Sessions Judge, whether distinct from that of Sessions Judge—Whether the court of an Assistant Sessions Judge an inferior criminal court to that of Sessions Judge—High Court, whether will entertain a criminal revision direct against the order of an Assistant Sessions Judge passed in appeal.*

By s. 435 of the Code of Criminal Procedure the High Court or any Sessions Judge may call for and examine the proceeding before any inferior criminal court to satisfy itself or himself as to the correctness, legality on propriety of any finding, sentence or order.

The High Court, as a rule, does not entertain criminal revisions unless the Sessions Judge had, first been approached in this regard, the rule however may be relaxed in special cases.

Where an Assistant Sessions Judge disposed of an appeal on a transfer from a Sessions Judge, the question arose whether a revision against the order of the Assistant Sessions Judge could be filed direct to the High Court without the Sessions Judge being approached in this regard in the first instance.

Held, that the Court of Session is for certain purposes divisible into many courts one presided over by the Sessions Judge or Additional Sessions Judge and another by an Assistant Sessions Judge. For the purposes of s. 435 of the Code of Criminal Procedure the court of the Assistant Sessions Judge is distinct from that of the Sessions Judge where an appeal is transferred to an Assistant Sessions Judge it shall be a proceeding before the Assistant Sessions Judge and not before the Sessions Judge. Further the Court of an Assistant Sessions Judge is an inferior criminal court to that of the Sessions Judge.

Consequently the Sessions Judge can entertain a revision against an order of an Assistant Sessions Judge even though passed in the exercise of an appellate jurisdiction.

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The High Court would, accordingly, not entertain an application in revision directly against the order of an Assistant-Sessions Judge unless the Sessions Judge had first, been approached in this ragard.

Municipal Board, Bijnor v. Bhim Singh 538

———ss. 99-A, 99-B and 99-D—Forfeiture of publications—Governments' order of forfeiture without stating grounds of its opinion, validity of—Scope of High Courts' power in setting aside an order of forfeiture. 437

———ss. 164, 530, 533 and 537—Record of confession in the course of investigation by Magistrate of the second class not specially empowered in this behalf by the State Government—Whether admissible in evidence—Defect, if curable. 380

———ss. 195, 476, 559—*If a Temporary Sessions Judge, who takes over the file of another temporary Sessions Judge in the same sessions division, can make a complaint under s. 476, Cr. P. C in respect of the offence under s. 195, Cr. P. C. committed in the court of his predecessor.*

The question referred to the Division Bench by the learned Single Judge was "whether on a temporary Sessions Judge being transferred from a judgeship another temporary Sessions Judge who is appointed to that judgeship and takes over the file of the transferred officer can exercise the powers of the first officer as 'successor-in-office' under s. 476, Code of Criminal Procedure in respect of offences enumerated in s. 195 of the Code that were committed in the court of his predecessor".

The Bench after considering the question at length,

Held, (i) that a temporary Sessions Judge who takes over the file of another temporary Sessions Judge in the same sessions division as to all intents and purposes a presiding officer of the court of Session and as such exercises the powers and performs the duties of that court.

(ii) that a temporary Sessions Judge can therefore make a complaint under s. 476, Code of Criminal Procedure in respect of the offences falling under s. 195 of the Code that were committed in the court of his predecessor.

(iii) that the answer to the question referred must, therefore, be in the affirmative.

Ayub v. State .. 361

———s. 197—Scope of— 682

———s 207-A—it, was introduced only to speed up and simplify the procedure and not to lessen the degree of proof. 32

———ss. 226 and 227—Charge framed by the Committing Magistrate—Power of the Sessions Court to withdraw or drop the same. 682

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——s. 561-A—Review in criminal appeal of the judgment and order passed by the High Court in appellate jurisdiction—If the High Court has jurisdiction to grant 725

Confession in the course of investigation—*Record of, by Magistrate of the second class not specially empowered in this behalf by the State Government—Whether admissible in evidence—Code of Criminal Procedure,* 1898, *s.* 164, 530, 533 *and* 537—*Indian Evidence Act,* 1872, *s.* 26.

Precedents—Judgments of Privy Council—Binding force of, on High Court—Constitution of India, 1950, *Art.* 225.

The accused while in a judicial lock-up in charge of an Assistant Public Prosecutor and guarded by police head constables were alleged to have made a confession which was recorded by a Magistrate, purporting to act under s. 164 of the Code of Criminal Procedure, of the second class without being specially empowered in that behalf by the State Government.

Held, that s. 164 of the Code of Criminal Procedure did not empower such a Magistrate to record the confession and the same was, therefore, inadmissible in evidence. The defect being one of substance and not simply of form and going to the root of jurisdiction was not curable under s. 533 or s. 537 of the Code. The accused being, for all practical purposes, in police custody, the confession could not be treated or received in evidence as extra-judicial confession made to an ordinary person. The confession could not be admissible under s. 26 of the Evidence Act either since the latter part of that section simply removes the bar against the admissibility of confession during police custody but is silent on how it is to be recorded which is provided for and governed by s. 164 of the Code. Proceeding on the analogy of the principle laid down under s. 530 of the Code the whole proceeding before the Magistrate in this case would be void.

Held, further, that Article 225 of the Constitution provides that the law administered in existing High Court unless altered by the appropriate authority shall be the same as immediately before the commencement of the Constitution. The law laid down by the Judicial Committee of the Privy Council save in so far as it conflicts with any ruling of the Supreme Court would, therefore, be binding on the High Courts in India.

Singhaya Singh *v.* State of Uttar Pradesh . . 580

Confirmation to a Government Post—Occupied by probationary servant—Status of confirmed Government servant, how acquired. 128

Constitution of India, 1950, Art. 14—the classification of railway ministerial servants retiring between the ages of 55 and 60

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years into those retiring up to and those retiring after September 8, 1948, with a provision for show cause notice and opportunity against proposed retirement to the latter category alone, whether constitutional. 195

———Arts. 14 and 310—Charge of immorality, corruption and gross dereliction of duty against a Police Officer—Proceedings under U. P. Disciplinary (Administrative Tribunal) Rules, 1947, whether discriminatory and void 167

———Art. 133(1)(c)—Order of remand for *de novo* trial, whether subject to and fit for appeal to Supreme Court. 7

———Art. 134(1)(c)—Appeal to Supreme Court from an order of acquittal passed or maintained by the High Court in a Criminal proceeding—Whether covered by or competent under cl. (c) of the article. 213

———*Art. 226 and U. P. (Temporary) Control of Rent and Eviction Act, 1947, ss. 3 and 7-F—Magistrate rejecting application for permission to institute suit for eviction—Revision dismissed by the Commissioner—Whether the State Government bound to send for the record of the Revisional Court exercising power under s. 7-F of the Act:*

Held, that sending for the record is not a condition precedent to the passing of the order under s. 7-F; the word 'may' is used in the section in the permissive and not in the mandatory sense.

It is no doubt desirable that the State Government should also send for the record of the revision, but on the view taken, it cannot be said that the State Government acted illegally in not sending for the record of the case before the Additional Commissioner.

The argument that the order of the District Magistrate is merged in the order of the Commissioner and therefore the record of the court of revision alone survives is not correct. Even though there may be a merger of one order with another, there is no merger of the record in which the two orders are passed.

An order of the Commissioner dismissing a revision against the order of the District Magistrate granting or refusing permission is not an order 'granting or refusing permission'. The question of merger of orders therefore does not arise.

Further it has not been explained how the appellant was prejudiced by the State Government's not summoning the record of the Commissioner's court. Under the circumstances the Court is not bound to quash the order of the State Government.

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No opinion was expressed on the argument that the District Magistrate alone and not the State Government had the power to grant permission to file a suit for ejectment. This question should more properly be raised before the Court which is seized of the suit.

Kailash Chandra Jain *v.* State of Uttar Pradesh 282

——Art. 226—If a petition under it can be dismissed *in limine* as being beyond 90 days without considering cause of delay—Limitation of, how to be computed. 409

——Art. 226—Delegation of power—Validity of notification by U. P. Government for land acquisition for the Union. 653

——*Art. 311, Applicability of, to persons "connected with defence"—Wrongful dismissal—Acceptance of guilt—Sufficient opportunity.*

"A member of a defence service" or "a person holding any post connected with defence" have been omitted and the omission appears to be intentional because the constitution makers wanted to make the dismissal and removal of these servants non-justiciable. As the plaintiff was an employee "connected with defence", therefore Art 311 will not apply.

After pleading guilty there was no question of giving him any opportunity to enquire into whether he had committed the theft or not.

There is a categorical finding of fact based on evidence that the plaintiff did refuse to accept the second show cause notice. If that was so, it cannot be said that the employers had not attempted to give him an opportunity.

The concurrent finding of fact about sufficient opportunity having been given is binding.

Babu Nandan *v.* Union of India ... 90

Court of Assistant Sessions Judge—Whether distinct from that of Sessions Judge and if inferior to it. 538

Dismissal from service *of a Police Officer of subordinate rank by the Governor—Whether competent—Charge of immorality, corruption and gross dereliction of duty—Proceedings under Tribunal Rules—Whether discriminatory and void—Indian Police Act,* 1861, *s.* 7—*U. P. Disciplinary (Administrative Tribunal) Rules,* 1947, *rr.* 4(1), 8 *and* 10—*U. P. Police Regulations, Reg* 490—*Constitution of India,* 1950, *Arts.* 14 and 310.

Held, (unanimously) that the power to dismiss, suspend or reduce a police officer of subordinate rank vested under s. 7 of the Police Act in the Inspector General of Police and other

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subordinate officers is not exclusive but subject and in addition to the provisions in the Constitution under which all civil servants (including under the present Constitution those in the Police force) in a State hold their office at the pleasure of the Governor, and are, as such, liable to removal or dismissal by him. There is, therefore, no substance in the plea that the Governor has no power to dismiss such officers from service.

(*Per* MAJORITY; DAS GUPTA, J. *contra*)—*In* respect of any of the charges (viz. immorality, corruption and gross dereliction of duty) enumerated in r. 4(1), a police officer could, it is true, be proceeded against either under the U. P. Disciplinary Proceedings (Administrative Tribunal) Rules or the U. P. Police Regulations according to the choice of the authorities. The procedure laid down in the two are, however, substantially the same and, therefore, the continuance of an enquiry after the Constitution under the Tribunal Rules cannot be attacked as violative of Art. 14 of the Constitution. The fact that the order of a Police authority in an enquiry under the Police Regulation is made appealable whereas that of the Governor under the Tribunal Rules is not made appealable cannot be said to offend the guarantee of equal protection since in either case the final order rests with the Governor who has to decide the matter himself. Rule 10 of the Tribunal Rules in so far as it obliges the Governor to accept and pass the order of punishment in terms recommended by the Tribunal may, in view of the absence of such obligation on the corresponding authority under the Police Regulation, be regarded as inconsistent with the Constitution, but the partial invalidity of this rule does not, being severable, effect the remaining rules.

(*Per* DAS GUPTA, J.)—The Tribunal Rules in so far as they do not provide for any appeal against the decision of the Governor, are in view of the right of appeal provided for under the Police Regulation, amount to an unequal treatment and are, therefore, void to that extent. It is difficult to agree that the right of appeal is a right without substance. The contrary view misses the realities of the position and is really an attempt to slur over the difficulty.

Jagannath Prasad Sharma *v.* State of Uttar Pradesh . . . 167

Dismissal of a Police Officer—Departmental trial preceded by Magisterial enquiry—Effect of. 205

Disputes as to Constitution of University authorities or bodies—Chancellor's power or order on reference—Whether judicial and to be exercised in compliance with the principles of natural justice. 634

District Magistrate—Within the meaning of s. 2(d) of the U. P. (Temporary) Control of Rent and Eviction Act, 1947, read

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with s 10(2) of the Code of Criminal Procedure if includes an Additional District Magistrate or is a *persona designata*. 521

Election Tribunal—Whether is a Court and whether the inherent powers of a court available to it. 298

Execution of Decree *for partition in favour of a joint Hindu family including minor sons—Limitation for, whether suspended during minority of sons—Indian Limitation Act, 1908, s 7—Code of Civil Procedure, 1908, O. XXXII, rr. 6 and 7.*

The word 'discharge' in s. 7 of the Limitation Act is not limited to discharge of monetary claims only but covers discharge or satisfaction of all other liabilities, e.g taking possession of property.

The managing member of a joint Hindu family can give a valid discharge of liability under a partition decree by accepting delivery of possession on behalf of his minor sons and, therefore, time would run against all the members of the joint family from the date of the decree. The limitation or durability of guardian *ad litem* under O. XXXII, rr 6 and 7 of the Code of Civil Procedure has no application to such cases.

Sarda Prasad *v.* Lala Jumna Prasad 26

Factories Act, 1948, s. 106—Limitation for filing complaint for prosecution under the Act, starting point of. 507

Financial Handbook, Vol. II, *rr. 12-A and 14—Confirmation to a Government post occupied by probationary servant—Status of confirmed Government servant, how acquired—If acquired by mere lapse of time—Whether acquires the status of "quasi permanent servant"—Doctrine of automatic confirmation.*

A Government servant on probation is not to be deemed to be confirmed on the expiry of the period of his probation, if no orders confirming him in his substantive post or extending his period of probation are passed by the competent authority and that the orders confirming the officer, terminating his appointment or extending the period of probation may be passed even after the expiry of the period of probation, provided the decision is based on the work and conduct during the period of probation.

The confirmation to a Government post occupied by a probationary servant is not a right which accrues to him automatically on the expiry of the period of probation He acquires the status of a confirmed Government servant on that post only as a result of an affirmative order passed by the competent authority. The period of probation is a period of trial which affords an opportunity to the authority to observe the performance of the servant on the post and to

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make up its mind on the expiry of the said period whether the servant is fit to be confirmed or not.

In other words, from the mere lapse of the period of probation it cannot be assumed that the servant has been confirmed, such an assumption would mean curtailment of the period of probation, which is not permitted.

If within a reasonable time the authority does not pass an order confirming the servant or extending his period of probation or terminating his service it will still not lead to the assumption that he has confirmed, his remedy could simply be to apply for a *mandamus* calling upon the authority to pass an appropriate order within a certain time.

In the absence of a provision in the contract or rules of service a servant cannot be presumed to have been confirmed after the lapse of any time since the expiry of the period of probation.

Mere expiry of the period of probation is not enough for confirmation, the person must have passed all prescribed tests and he must have been found to be fit to the satisfaction of the Governor. The existence of these conditions is quite inconsistent with the doctrine of automatic confirmation.

A Government servant at no stage acquires a status of a 'quasi-permanent' servant. He can be either a probationary servant or a confirmed servant if so made by the authority concerned.

The Chief Conservator of Forest, U. P. *v.* D. A. Lyall 128

Foreigners Act, 1946, *s.* 14—If, a person who does not obtain a permit and stays on in India beyond the date mentioned in the visa contravenes the section. 738

Foreigner entering India on a visa—*Duties and liabilities of, regarding registration and stay in India—Foreigners Act,* 1946, *ss.* 3(2)(*c*) *and* 14—*Foreigners Order,* 1948, *para* 7.

(*Obiter*) paragraph 7 of the Foreigners Order, 1948, imposes on a foreigner entering India on the authority of a visa a two-fold duty : (*a*) to obtain a permit indicating the period during which he is authorised to remain in India, and (*b*) to deport from India before the expiry of the period so fixed or extended by the Central Government. A violation of either of these conditions by itself amounts to an offence punishable under *s.* 14 read with *s.* 3(2)(*c*) of the Foreigners Act.

Kallan Khan *v.* State 351

Foreigners Order, 1948, **Para** 7—Duties and liabilities of foreigners entering India on a visa regarding registration and stay, in India. 351

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——Para 7—Requisites of conviction for foreigner's overstay in India. 385

Foreigner's overstay in India—*Requisites of conviction for—'Definition of a foreigner' in 1953—Foreigners Act, 1946, ss. 2(a), 3 and 14—Foreigners Order, 1948, para. 7—British Nationality and Status of Aliens Act (4 and 5 Geo. 5, Ch. 17) s. 1(i)(a).*

No one can be convicted for a breach of paragraph 7 of the Foreigners Order unless he was a foreigner at the time of his entry in India. A natural born British subject entering India in 1953 on a passport granted by the Government of Pakistan did not fall within the then definition of a 'foreigner' and was, therefore, not liable to conviction for overstaying in India beyond the period allowed by the visa.

Fida Husain *v.* State of Uttar Pradesh ... 385

Forfeiture of lease by denial of title—*Rule of, whether applicable to lessor's assignee—Denial of title and* bona fide *putting assignee to proof of title—Distinction between—General principles on forfeiture—Transfer of Property Act,* 1882, *s.* 111(*g*).

The law on forfeiture of lease by denial of title applies not only to denial of lessor's title but also to that of his successor-in-interest with this difference that the initial contract of lease in the latter case, being not with the assignee himself but with his predecessors-in-interest, the lessee is entitled *bona fide* to put the assignee to proof of his title. The question whether what the lessee has said or done amounts to denial of title or simply requiring proof of it must depend and be decided on the facts of each case in the light of general principles, viz. (i) law leans against forfeiture (ii) onus of proving forfeiture rests on the lessor, (iii) denial of title must be unequivocal and (iv) where denial of title is in writing, the document must be construed as a whole without undue emphasis on parts thereof.

Held, reversing the judgment of CHATURVEDI, J. in *Ram Das v. Sri Ram Lakshman Janki* that the facts of this case were more susceptible to the construction that the lessee had simply put the assignee to proof of her title than that he had denied her title and there was, therefore, no forfeiture of lease.

Ram Das *v.* Sri Lachhman Janki 554

Forfeiture of lease for non-payment of rent—*Relief, against, when available—'Rent in arrears' meaning of—Transfer of Property Act,* 1882, *s.* 114.

The jurisdiction of the court under s. 114 of the Transfer of Property Act to relieve the lessee from the forfeiture of lease for non-payment of rent is equitable the exercise of which rests in the discretion of the court and may well be denied to a lessee who does not come with clean hands or raises all kinds

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of unnecessary, vexatious or frivolous pleas with a view to delay the disposal of the case or to harass the lessor

The arrears of rent which the lessee is bound to pay or secure as a condition precedent for the grant of the equitable relief means rent due up to the date of tender, where the relief is granted it means as if forfeiture had never occurred The relationship of lessor and lessee is, therefore, deemed to have subsisted all through and the amount due even after the forfeiture alleged or determination of the lease notified is not 'damage for use and occupation' but is 'rent due' and it is not open to the lessee to raise that distinction and plead his obligation only to the extent of rent due up to the date of forfeiture or determination of the lease.

Narsingh Das *v* Parmeshwari Das . 550

Forfeiture of publications *which are seditious or tend to promote class hatred or are calculated to outrage religious feelings—Government's order of forfeiture without stating grounds of its opinion, validity of—Scope of High Court's power in setting aside an order of forfeiture—Code of Criminal Procedure, 1898, ss. 99-A, 99-B and 99-D.*

(Per Majority. DAS GUPTA, J., *contra)*

The power of the High Court under s 99-D of the Code of Criminal Procedure is limited to examining the grounds of opinion of the State Government on the publication in question being seditious or tending to promote class hatred or calculated to outrage religious feelings so as to be punishable under any one or more of sections 124-A, 153-A or 295 of the Penal Code Wherefore, if the State Government does not state in the order the grounds of its opinion, the order of forfeiture must be set aside on that ground alone. The High Court, in such a case, has no power to examine for itself whether the publication is in fact punishable under the sections aforesaid so as to entail forfeiture.

(Per DAS GUPTA, J.)—That the Government should record the grounds of its opinion is undoubtedly a salutary provision diminishing, as it does, the risk of an arbitrary order. There is, however, no justification for the view that the High Court can not or is not in a position to interfere unless the grounds of its opinion are stated by the State Government. The duty cast by s. 99-D of the Code of Criminal Procedure on the Judges of the High Court is not to see whether in a particular case the grounds stated by the Government for forming its opinion are correct but to see whether the opinion formed was correct. To perform this duty the one and the only way is to examine the document with a view to determine the question whether the publication falls within or is punishable under any one or more of sections 124-A, 153-A and 295 of the Penal Code.

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Hornam Das v. State of Uttar Pradesh ... 437

Identification witnesses—Produced for the first time at the trial before the Sessions Judge in a case under s. 396 of the Indian Penal Code—Whether ignoring of such evidence justified 32

Income Tax—*Silver coins forming part of cash balance of assessee ceasing to be legal tender-coin by sale of whether taxable—Income Tax Act*, 1922, *s.* 4(3)(vii)

Where silver coins included in the cash balance of the assessee carrying on money lending business cease to be legal tender they cannot thereafter be said to form part of the stock-in-trade of the money lending business. The profit made by the sale of silver coins at a price higher than their denominated value cannot, therefore, be said to be appreciation in stock-in-trade. In the absence of any finding or material on record to establish that the assessee had been accumulating those silver coins from year to year with the effect of making profit, the gain in question is one of a casual and non-recurring nature and is, as such, not liable to income-tax.

Messrs. Gappu Mal Kanhaiya Lal v. Commissioner of Income-tax 84

Indian Companies Act, 1913, ss. 175(1) and (2). 235(1)—Winding up of a Company—Liability of delinquent directors, etc. —Limitation for proceedings against computation of,—Liability of legal representative of delinquent director . 570

Indian Income Tax Act, 1922, s 6—*'Interest payable on zamindari compensation bonds by State Government if amounts to additional compensation not liable to tax or, is income from security or from 'other sources' liable to tax,—U. P. Zamindari Abolition and Land Reforms Act*, 1950, *ss.* 27 *to* 54, 60, 61, 65, 68 *and rules* 62, 63, 65 *and* 66.

The question that arose for determination in the writ petition was, whether the 'interest' payable on zamindari compensation bonds by the State Government is really not interest or income but is additional compensation not liable to income-tax, or, that it is income from securities or from 'other sources' and as such a revenue receipt which is liable to income-tax.

The court after considering in detail—

Held, (i) that the amount paid under the name of 'interest' cannot partake of the nature of compensation or damages but are in the nature of a return for the use that the Government makes of the money under the law deemed to be belonging to the intermediary.

(ii) that the sums which are paid as interest on the compensation bonds are not compensation

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(iii) that the compensation bonds cannot be held to be Government security within the meaning of the Indian Securities Act.

(iv) that the compensation bonds which are in the form of promissory notes are fully covered by the definition given in sub-s. (2) of s. 2 of the Public Debt Act.

(v) that if there was some difficulty (though there seems to be none) in holding that the interest on compensation bonds issued to the petitioner is not interest on securities it would yet be taxable as it would be an income from 'other sources'.

(vi) that the sums of interest on the compensation bonds are liable to be charged to income-tax.

Raja Jagdambika Pratap Narain Singh *v.* Commissioner of Income-tax, U. P. ... 52

Indian Limitation Act, 1908, s. 7—Execution of decree for partition in favour of a joint Hindu family including minor sons—Limitation for, whether suspended during minority of sons 26

———Arts. 30 and 31 of the First Schedule—if can be projected over the provisions of ss. 72 and 77 of the Indian Railways Act, 1890 1

Indian Penal Code, 1860, ss. 424, 24 and 23—the owner during the subsistence of attachment of his property by Court kept in possession of Court's agent resorts to force and takes back possession of the property—if his act amounts to dishonest removal of property causing wrongful loss to the court and if is punishable under s. 424 of the Code 13

———*S. 396, and Code of Criminal Procedure, 1898, s. 207-A—In a case under s. 396 Indian Penal Code only two witnesses examined in the committing magistrate's court—Identification of one of these was totally unreliable—Sessions Judge ignored the evidence of other identification witnesses produced for the first time at the trial—Whether ignoring of such evidence justified.*

Held, the Legislature amended the Code of Criminal Procedure only to speed up the committing proceedings and not to lessen the degree of proof which was considered necessary earlier. The trial court was justified in feeling doubtful about the identification of those witnesses who were not examined in the committing magistrate's court.

———*S.* 412—Identification of property cannot be placed on the same footing as identification of a person. The owner is well acquainted with the stolen article and even though ostensibly there may be no distinctive mark, an owner can very frequently be trusted to pick up his own article from a large number of similar articles.

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The rule laid down in *Lalla Singh's* case is not applicable to e identification of property.

State *v.* Ram Bilas 32

dian Police Act, 1861, s. 7—Dismissal from service of a Police Officer of subordinate rank by the Governor—Whether competent 167

dian Railways Act, 1890, s. 77—Non-delivery of goods to the consignee, whether covered by expression or cause loss, destruction or deterioration of goods—Condition precedent of preferring the claim for compensation within the prescribed time whether attracted 1

ndian Railway Establishment Code, r. 2046/2(*a*)—Railway Ministerial servants, whether entitled as of right to continue in service till 60 years of age 195

ndian Stamp Act, 1899, ss. 31, 32 and 33—Presentation of a document to Collector for determination of stamp duty—Power of Collector to impound the document after determining duty chargeable 75

ndividual member of a society—When has a right to bring suit in civil court 691

ndustrial Dispute in U. P.—*Power of State Government regarding conciliation or adjudication of industrial disputes—Constitutionality of.*

State Government setting up conciliation boards and industrial tribunals without any recital in the order as to its satisfaction about the existence of condition precedent of public safety, etc.—Validity of the order—U. P. Industrial Disputes Act (No. XXVIII of 1947), s. 3, cl. (c), (d) and (g).

S. 3 of the U. P. Industrial Disputes Act empowering the State Government, *inter alia,* to appoint industrial courts, to refer industrial disputes for conciliation or adjudication and to pass incidental and supplementary orders in that behalf if it is, in its opinion, necessary or expedient in the interest of public safety, convenience or order, etc. is constitutional and does not suffer from the vice of excessive delegation. All that has been left to the Government by that section is to carry out by subordinate rules or orders the policy and purposes of the Legislature defined in the Act within the prescribed limits and there is, therefore, no delegation of essential legislative function to the State Government.

The orders of the State Government under s. 3 of the Act setting up conciliation boards and industrial tribunal for settlement of industrial disputes are valid and effective although they did not disclose therein that the State Government had satisfied itself as to the necessity or expediency of the orders in the interest of public safety, convenience, etc.

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Where certain conditions precedent have to be established before a subordinate authority can pass an order (be it executive or of the character of subordinate legislation) it is not necessary that the satisfaction of those conditions must be recited in the order itself unless the Status requires it, though it is most desirable that it should be so, for in that case the presumption that conditions were satisfied would immediately arise and the burden would be thrown on the person challenging the fact of satisfaction to show that what is recited is not correct. But even where the recital is not there on the face of the order, the order will not become illegal *ab initio* and only a further burden is thrown on the authority passing the order to satisfy the court by other means (in this case through an affidavit filed in appeal before the Supreme Court) that the conditions precedent were complied with. That would come to cure the defect and render the order valid and effective.

The Swadeshi Cotton Mills Co. Ltd. *v.* The State Industrial Tribunal, U. P. .. 149

Interim relief—Power of High Court to grant—On certificate for leave to appeal to Supreme Court granted from an order dismissing petition for *certiorari* and *mandamus* .. 246

Interpretation of Statutes—*Every part of statute should have effect—General provisions of Statute, whether should yield to special provision—Government Order, cl. 5(a) and cl. 23 under U. P. Industrial Disputes Act, 1947, construction of.*

By clause 5(*a*) of the Government Order issued by the Governor of the United Provinces in exercise of the powers conferred on him by the U. P. Industrial Disputes Act, 1947, 'any employee or recognised association of employers. . . may by application in writing move the Board to enquire into any industrial dispute.

Clause 23 of the Government Order however provides that no employer. . . shall during the continuance of an enquiry or appeal discharge or dismiss any workman save with the written permission of the Regional Conciliation Officer concerned.

Where an application was made by an Employers' Association under clause 5(*a*) of the order for the dismissal of the watch and ward staff when an enquiry was pending under clause 23 and the Board granted the application but the Labour Appellate Tribunal dismissed it on the ground that the application under clause 5 (*a*) was not maintainable. The Employers' Association filed a petition under Article 226 which was dismissed and on Special Appeal the order was affirmed but a certificate under Articles 132(1) and 133 (1) (*c*) was granted to file an appeal to the Supreme Court.

On appeal to the Supreme Court,

Held, that in the interpretation of Statutes the courts always presume that the Legislature inserted every part thereof for a pur-

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ose and the legislative intention is that every part of the Statute hould have effect. The rule of interpretation of Statutes further s that the general provisions should yield to specific provisions nd the general provision applies only to such cases which are ot covered by the special provision. On an application of the bove rule of interpretation of Statutes clause 5 (a) has no application to a case where the special provisions of clause 23 are applicable.

Consequently when an enquiry was pending before a Conciliation Officer clause 23 applied in respect of any discharge or dismissal of a workman and the employer could not take the advantage of clause 5(a) of the Government Order and such an application could not in law be entertained by the Board.

The J. K. Cotton Spinning and Weaving Mills Co. Ltd. v. The State of Uttar Pradesh 495

Jurisdiction of Civil Courts—*Want of local jurisdiction—Waiver of objection to or acquiescence in exercise of jurisdiction—Effect of, on the validity of executability of decree passed—Code of Civil Procedure,* 1908, *ss.* 21, 47 *and* 151.

It is well settled that the want of local jurisdiction in a civil court does not stand on the same footing as the want of inherent jurisdiction, i.e. where the court is not at all competent to try the case. The former though not the latter is curable by consent or waiver.

Accordingly, where the court does not suffer from want of inherent jurisdiction but simply for want of territorial jurisdiction arising from the fact that the entire cause of action arose outside the local limits of its jurisdiction and the defendant does not object to the suit being referred for decision to the arbitrator, he is estopped from subsequently challenging the jurisdiction of the court to entertain the suit or to refer it for arbitration or the award itself.

Hira Lal Patni v. Sri Kali Nath . 481

Land Acquisition—*Award of Collector—Application for reference of objection on award to court for decision—Limitation for ". . . . . six months from the date of Collector's award"—Meaning of—Land Acquisition Act,* 1894, *s.* 18, *proviso (b).*

The limitation for an application under s. 18 of the Land Acquisition Act to refer the objection against the award of the Collector to the Court for decision *inter alia* is "six months from the date of the Collector's award . . . . ." The knowledge of the party affected by the award being an essential requirement of fair play and naturally justice, the expression "the date of the award" means not the date when the physical act of writing or signing the award was done but the date when

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the award is either communicated to the party or otherwise comes to his knowledge actually or constructively.

Raja Harish Chandra Raj Singh *v.* The Deputy Land Acquisition Officer 372

Land acquisition for the Union—*Notification by U. P. Government—Delegation of power—Validity of notification for—Land Acquisition Act,* 1894, *ss.* 3(*cc*) *and* 4—*Constitution of India,* 1950, *Art.* 258(1).

Writ petition—Multifariousness and its effect—Subsisting interest of petitioner—Necessity of, Constitution of India, 1950, *Art.* 226.

Under Art. 258(1) of the Constitution, the power of delegating to a State Government any of the functions of the Union Executive vests in and is exercisable by the President. A notification by the Government of India purporting to be a delegation by the Central Government of its powers under or for the purposes of the Land Acquisition Act is, therefore, invalid and ineffective.

The notification under the aforesaid delegation issued by the U. P. Government for acquiring land for the purpose of the Union N. E. R. Headquarters Scheme is, therefore bad in law and liable to be quashed.

A single petition challenging different notifications regarding two different and separate parcels of land in both of which all the petitioners are not interested is bad for multifariousness and unmaintainable. The counsel may however have his choice of withdrawing as much of the petition as may be necessary to remove the defect.

The petitioner under Art. 226 of the Constitution, must, it is no doubt true, have a subsisting interest in the subject matter of the writ. Such interest, however, is deemed to exist where the petitioner has a *prima facie* right and is litigating for the same.

Balak *v.* State 653

Lease by receiver—Summary jurisdiction of Court to evict the lessee 389

Life Insurance Corporation Act, 1956, *s.* 11(1)—*Corporation's power to alter terms regarding transferred employees—S.* 49 (*b*), *covered cases of transferred employees—S.* 49(*bb*), *introduced by Amending Act removed all doubts—S.* 22(5), *Entrustment of superintendence and directions in Zonal Manager, Meaning of—S.* 3 *of Essential Supplies (Temporary Powers) Act,* 1946, *sub-section* (2) *of s.* 2 *of Defence of India Act* 1939.

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Even a cursory reading of sub-section (1) of section 11 of this Act will convince that the transferred employees were to continue in the service of the corporation on the old terms and conditions until these were duly altered by the corporation. That is the corporations possessed the power to alter those terms and conditions which once they were altered ceased in favour of the new terms and conditions to be in force in their earlier shape.

The clause (*b*) of s. 49 of the Act already covered the cases of transferred employees and clause (*bb*) has been introduced simply for the sake of ending all doubts which might have existed in that behalf.

There is another reason on account of which the corporation possessed the necessary authority to make regulation in case of transferred employees also. The main power to make regulations is derived under sub-s. (1) and sub-s. (2) of s. 49 in stating the various matters upon which the regulations may be made is illustrative only. The power itself, and with which we are concerned, to make regulations belongs under sub-s. (1). The words "such regulations may provide for' in sub-s. (2) clearly point out that the regulations may provide for the matters enumerated in clauses (*a*) to (*m*) will still be made under sub-s. (1). The matters which are stated in sub-s. (2) are same only of the matters for which provision may be expedient for purpose of giving effect to the provisions of the Act, but they are not all those matters for which provision can be made.

Sub-section (1) of section 11 is indeed one of the matters for which provision is necessary for giving effect to the provisions of Act. The list of the matters in sub-section (2) is thus neither descriptive nor exhaustive. It is on the other hand illustrative. In order to find out whether the corporation is competent to make regulations on particular subject or matter the test is not to discover the particular matter in the various items contained in sub-section (2) but to look to the Act itself and if the Act has contemplated provision by regulation of such matter. It will be open to the corporation in the exercise of the power given to it by sub-section (1) to make regulations for giving effect to it.

The power of superintendence and direction given to the Zonal Manager by the section will thus extend to all administrative matters concerning his zone including his subordinate office. Since the Zonal Manager is entrusted with the affairs and business of the Zonal Office he has a legal duty cast upon him to see that the affairs are conducted properly and in accordance with law. If any employee or servant acts in a manner which Zonal Manager considers is detrimental or injurious to the officers and business which is entrusted to his superintendence and direction he will certainly be within his powers to take

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such action as is deemed suitable by him. The suspension of employee pending enquiry into the charges against him is certainly a matter which he will be competent to order. Therefore upon a reading of section 22 itself we are satisfied that the Zonal Manager had the power to make the suspension order.

Sri Kedar Nath Sethi v. Life Insurance Corporation of India . . . 102

Limitation—for an application under s. 18 of the Land Acquisition Act, 1894, for reference of objection on award to court for decision—"Six months from the date of the collector's award. . . . . ." Meaning of 372

Limitation of filing a writ petition—*Filed under Art.* 226 *Constitution of India—if can be dismissed* in limine *as being beyond* 90 *days without considering cause of delay—If the time spent in obtaining a certified copy of judgment or order required and the* 14 *days' time required for giving notice to the Standing Counsel to be excluded in computing limitation.*

The question that arose for determination in the Special Appeal were whether the writ petition can be thrown out *in limine* merely on the ground that a period of 90 days has elapsed since the date of the impugned order without considering the cause of delay and whether in computing the period of limitation of 90 days which is the conventional period observed by this Court a party is legitimately entitled, to exclude the time spent in obtaining a certified copy of the impugned order or judgment to be filed and also to exclude 14 days' time required for giving notice to the Standing Counsel under rules of the court.

The court after considering in detail, *held*, (i) that it will be erroneous to throw out a writ petition *in limine* merely on the ground that a period of 90 days has elapsed since the date of the impugned order without considering the propriety, sufficiency or reasonableness of the situation and applying one's mind to other factors that are alleged to have intervened and caused delay;

(ii) that where the court is of opinion that application could not be filed within the period of 90 days owing to circumstances which were beyond the control of the parties concerned or other reasons which in equity would incline the court to condone the delay, there is no bar in law to the entertainment of such an application;

(iii) that a petitioner filing a writ petition should be considered entitled to exclude the period spent in obtaining a copy of the impugned judgment or order;

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(iv) that the party presenting the application would also be entitled to exclude the entire period of fourteen days (required for giving notice to Standing Counsel) excluding the day on which the notice was served;

(v) that even though the order of the learned single Judge was of a discretionary nature, the discretion vested in the court was not exercised on recognised judicial and equitable principles.

Sarbjeet Singh *v.* Deputy Director of Consolidation 409

Lucknow University—*Disputes as to Constitution of University authorities or bodies—Chancellor's power or order on reference—Whether judicial and to be exercised in compliance with the principles of natural justice—Lucknow University Act, 1920, s. 39—Statutes of Lucknow University, St. no. 3.*

On the recommendation of the Selection Committee, the petitioner was appointed on probation for two years the Professor of Law in Lucknow University. Respondent no. 3 who had been a candidate for the said post made a representation to the Chancellor challenging the constitution of the Selection Committee and the validity of its recommendation and the resultant appointment. The Chancellor, in exercise of his power under s. 39 read with Statute no. 3 of the Lucknow University Act sent for reply from the University and after hearing the Vice-Chancellor for the University and Respondent no. 3, held that the Selection Committee had been illegally constituted with the result that its recommendation and the appointment based thereon were null and void. The petitioner thereupon moved the High Court for, *inter alia* quashing the Chancellor's order:

Held, that the function or power under s. 39 of the Act being judicial or at least quasi-judicial and there being nothing to the contrary therein or in Statute no. 3 supplementing the same, the Chancellor was bound to conform to the principles of natural justice and since the petitioner who was directly and vitally affected thereby was not given any notice or opportunity for a hearing, the impugned order was bad in law and liable to be quashed.

The validity of the appointment itself being in question, the fact of the appointment remaining on probation or the remedy through a reference to arbitration could not be pleaded as a bar to the writ.

B. K. Gupta *v.* Chancellor, Lucknow University 634

Magistrate—if competent to file a complaint against a person suspected of having committed an offence under Suppression of Immoral Traffic in Women and Girls Act, 1956 627

Merger of decree—Application for amendment of decree affirmed in appeal—Which court has power to amend the decree. 486

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Merger of records—Where there is a merger of one order of the inferior authority with another order of the superior authority, if, there is also merger of the records in which the two orders are passed 282

Motor Vehicles Act, 1939, s. 44(2)—Effect of 672

Notice of ejectment—terminating tenancy by 5th October, 1954 and to pay arrears of rent by 10th October, 1954, if valid .. 120

Order of Acquittal—Passed or maintained by the High Court in a criminal proceeding—Appeal to Supreme Court from such order—Whether covered by or competent under cl. (2) of Art 134(1) of the Constitution of India 213

Order of mutation court—*Under s. 35 of U. P. Land Revenue Act, 1901—On the compromise application of the parties, if embodies the whole petition of compromise.*

The questions that arose for determination were firstly whether in the instant case the order of mutation court embodied the petition of compromise effecting immovable property worth more than Rs.100 which purports to regulate the future rights of the parties in that property, secondly, whether the petition of compromise having been embodied in the order, becomes admissible and thirdly whether the compromise evidenced by the order is conclusive and binding upon the parties.

The court held—

(i) that the word 'approved' written on the compromise application suggests that the Sub-Divisional Officer only granted the prayer expressly asked for in the application, the express prayer being that the names of the parties should be mutated over specified properties.

(ii) that the order should be deemed to refer to and embody only those provisions of the compromise which specified the properties; it cannot be made to refer to and embody those provisions of the compromise which declared the parties to be absolute owners nor could it be assumed that the Sub-Divisional Officer who had no power to decide property rights, gratuitously incorporated them in his order.

(iii) that since the order is ambiguous it must be presumed that it directed what the Sub-Divisional Officer was asked to do and what he would lawfully do.

(iv) that the order of the mutation court did not embody that part of the compromise application which declared the parties to be absolute owners.

(v) that in view of the opinion on the first question the other questions become moot and it was not necessary to express opinion on them in this case.

Ramgati Chaubey *v.* Ram Adhar Chaubey ... 46

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Persona designata—If, is a person who is selected to act in his private capacity and not in his capacity as a judge. . 521

Persons connected with defence—applicability of Art. 311 of the Constitution of India 90

Police Act, 1861, s 7—Dismissal of a Police Officer, *Police Regulations, paras* 486 *and* 489—*Construction of—Departmental trial, preceded by Magisterial enquiry—Effect of—Para* 486 *of the Police Regulations, whether applicable to the case.*

Where a police officer was charged with remissness in the discharge of duty and of dishonesty, corruption and misbehaviour or he was transferred from one station to another after a magisterial enquiry and thereafter dismissed by the Superintendent of Police after a trial under section 7 of the Police Act. He filed a writ petition before the High Court which quashed the order of dismissal on the ground that the police officer having been charged with commission of cognizable offences, para 486(1) of the Police Regulations governed the situation and no case as required by para 486(1) having been registered against the police officer in the police station, the order of dismissal was invalid.

On an appeal by the State by special leave to the Supreme Court on the ground that a magisterial enquiry having been held in regard to practically all the charges, the subject-matter of the departmental trial, the case was not covered by the provisions of para 486 of the Police Regulations:

Held, that the departmental enquiry was only a further step in respect of the misconduct of the respondent in regard whereto the magisterial enquiry was held at an earlier stage.

A combined reading of the provisions of paras 486 and 489 of the Police Regulations indicate that para 486 does not apply to a case where a magisterial enquiry is ordered and a police officer can be departmentally tried under s. 7 of the Police Act after such magisterial enquiry.

The departmental trial having been held subsequent to the completion of the magisterial enquiry, the case fell within the express terms of para 489(2) and the trial was consequently valid.

The appeal was accordingly allowed and the case remanded to the High Court for disposal according to law.

State of Uttar Pradesh *v.* Ajodhya Prasad . 205

Police Regulations, paras 486 and 489—Construction of 205

Power of Collector to impound the document—after determining duty chargeable—which was presented to him under s. 31 of the Stamp Act 75

Precedents—Judgments of Privy Council—Binding force of, on High Court 580

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Prevention of Food Adulteration Act, 1954, ss. 2(i)(l), 7, and 16(1)(ii)—Sale of a mixture of cow and buffalo milk—Absence of a prescribed standard for the mixture—Adulteration, how adjudged—Scope of duty of public analyst—Prosecution for second offence—Trial as a summon's case, legality of. .. 229

——— s 7(1), *read with* s 16(1) (*a*)—*S.* 19(1), *vendor's ignorance no defence in prosecution—Word 'sale' defined.*

The provision [S. 16(1) (*a*)] as it stands is an easily understandable provision of law. The fundamental rules of interpretation that the Court will neither add any word to, nor substract anything from, the provision unless it is necessary to do so. So there is no reason for adding any words to the enactment as it stands. Therefore the section as it stands clearly punishes any person who sells an adulterated article. It does not say that the person must make a sale for or on his own behalf. It merely provides that any person who sells an adulterated article may be punished and there is no reason for making any distinction between a master and a servant if he actually makes a sale.

The Municipal Board, Bara Banki *v* Fakhrul Hasan ... 97

Principles governing conduct of judicial and quasi-judicial proceedings—*Existence of a reasonable suspicion of bias—Test applicable—Motor Vehicles Act,* 1939, s. 41(2)—*Effect of*

By s 41(2) Motor Vehicles Act " . . No person who has any financial interest whether as proprietor, employee or otherwise in any transport undertaking shall be appointed as or continue as a member of a State or Regional Transport Authority . "

Where one of the members of the Regional Transport Authority was related to a person in whose favour a stage carriage permit was granted. The State Transport Authority Tribunal cancelled the same on the ground that grant of such a permit would shake public confidence. This view having been upheld in a writ petition against the order of the State Transport Authority Tribunal, on a special appeal, *inter alia* on the ground that the Legislature had impliedly excluded from consideration any disqualification from membership of a Regional Transport Authority other than the disqualification mentioned in s. 41(2).

Held, that, the general principle governing the conduct of judicial and quasi-judicial proceedings to the effect: (i) that no man shall be a judge in his own cause, (ii) that justice should not only be done but manifestly and undoubtedly seem to be done and that if a member of a judicial body is in such a posi-

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tion that a bias must be assumed to exist against him, he ought not to take part in the decision or sit in the tribunal were equally applicable to the proceedings under the Motor Vehicles Act. The provisions of s. 44(2) of the Motor Vehicles Act do not limit the grounds on which a person may be disqualified. Ground mentioned in the abovementioned provision is in addition to those which exist under the general law. The test to be applied in such cases is the existence of a reasonable suspicion of bias, which being present in the instant case, the permit was incorrectly granted. The appeal was accordingly dismissed.

Hukam Chand *v.* State Transport Authority Tribunal . 672

Prosecution of Sarpanch of Nyaya Panchayat—Sanction of State Government, whether and when necessary 682

Prosecution under Factories Act—*Limitation for filing complaint for, Starting point of—Factories Act*, 1948, s. 106.

The period of three months' within which the complaint for an offence punishable under the Factories Act must be filed by the Inspector is to be computed from—(i) the date of his observation where the complaint is based directly on his personal knowledge, (ii) the date of receipt by him of the information where the complaint is based on information received through others, if being immaterial in the latter case whether the information is such which he believes instantaneously or after due enquiry.

The question of the date of the Inspector's knowledge of the alleged commission of the offence cannot be left to him or be provable by his evidence alone.

R. S. Sharma *v.* State 507

Public Analyst—Scope of his duty defined .. 229

Question of citizenship—*if can be decided by the Central Government or the law courts—What is the effect of cl. (iii) of Sch. III of the Citizenship Rules of 1956—If a person who does not obtain a permit and stays on in India beyond the date mentioned in the visa contravenes s. 14 of the Foreigners Act*, 1946.

The revision petition has been filed by Khalil Ahmad against his conviction and sentence under s. 14 of the Foreigners Act, 1946, and his contention was that he was not a 'foreigner' within the meaning of the Foreigners Act, and that he was an Indian citizen at the time when he went to Pakistan within the meaning of Art. 5 of the Constitution of India. Questions arising in the case were referred to the Division Bench which after considering them in detail.

Held, (i) that the question of citizenship can only be decided by the Central Government in accordance with s. 9(2) of the Citizenship Act and as there was no decision of the Central

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Government in the present case that the applicant was not a citizen of India, he could not be prosecuted and convicted under s. 14 of the Foreigners' Act.

(ii) that the rules of evidence framed in cl. (iii) of Schedule III of the Citizenship Rules, 1956 are not violative of Art. 19 of the Constitution of India and the Central Government has power to determine the question of citizenship in accordance with those rules:

(iii) that if a foreigner does not obtain a permit as required by para 7 of the Foreigners Order, 1946, he renders himself liable under s. 14 of the Foreigners Act.

Khalil Ahmad v. State .. 738

Railway Ministerial Servants—*entering service on or after April 1, 1938, or those in service from before that date but without any lien on a permanent post till then,—Whether entitled to continue in service till 60 years of age—Classification of those ministerial servants retiring before 60 years in age into those retiring before and those retiring after September 8, 1948, with a provision for show cause notice and opportunity against proposed retirement to the latter—Whether constitutional—Indian Railway Establishment Code, R. 2046/2(a)—Constitution of India, 1950, Art. 14.*

The correct interpretation of rule 2046/2(a) of the Railway Establishment Code is that a railway ministerial servant may be retained in service between the ages of 55 and 60, provided he continues to be efficient. Such retention, however, rests solely in the discretion of the appropriate authority and cannot be claimed as of right by a servant even though his efficiency is undisputed.

The classification of railway ministerial servants retiring between the ages of 55 and 60 years into those retiring up to and those retiring after September 8, 1948, with a provision for show cause notice and opportunity against proposed retirement to the latter category alone is reasonable and permissible and is not, therefore, hit by the guarantee of equal protection under the Constitution.

Kailash Chandra v. Union of India ... 195

Receiver—Is there automatic discharge of the receiver on termination of proceedings in which he was appointed . 691

——*Duration of office of, in a suit—Lease by receiver—Summary jurisdiction of court to evict the lessee—Code of Civil Procedure, 1908, O. XL, r. 1.*

There is no express provision in the Code of Civil Procedure with regard to the time when and the mode in which the office of receivership comes to an end. A review of the relevant texts leads to the following summary of the law on this subject:

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(1) If a receiver is appointed in a suit until judgment, the appointment is brought to an end by judgment in the suit. (2) If a receiver is appointed in a suit, without his tenure being expressly defined, he will continue to be receiver till he is discharged, (3) But after the final disposal of the suit as between parties to the litigation the receiver's functions are terminated, he would still be answerable to the Court as its officer till he is finally discharged, (4) The court has ample power to continue its receiver after the final decree if the exigencies of the case so require.

(*Obiter*) The relevant decisions of the High Court in India seem to converge to the view that a court cannot evict a lessee from a receiver whether he is a party to the suit or not, in exercise of its summary jurisdiction unless the lease expressly conferred a right of re-entry under the lease deed on the receiver.

Seth Hira Lal Patni *v.* Seth Loonkaran Sethiya 389

Refusal to grant special leave to appeal by Supreme Court—Effect of, on the power of High Court to revise or alter its judgment in exercise of its inherent powers . 725

Res judicata—Plea of, when available 606

Review in Criminal Appeal—*Of the judgment and order passed by the High Court in appellate jurisdiction—If the High Court has jurisdiction to grant under s 561-A, Code of Criminal Procedure, 1898—Effect of the refusal by the Supreme Court to grant special leave to appeal and the remedy available.*

The applicants were convicted under s. 302. Indian Penal Code by the Sessions Judge, Naini Tal. Sadhu Singh was sentenced to death while the remaining applicant were sentenced to life imprisonment. Their appeal was dismissed by the High Court on 12th July, 1960, and an application for leave to appeal to the Supreme Court was also dismissed Thereafter they moved the Supreme Court by means of a petition for special leave to appeal but it was rejected.

The applicants now applied to this Court under section 561-A, Code of Criminal Procedure for review of the appellate order of the High Court dated 12th July, 1960, with a request to summon fresh evidence and to re-examine the case in the light of new facts brought to its notice. A preliminary objection was raised on behalf of the State that the applications for review filed by the applicants were not maintainable.

The Court after considering in detail—

Held, (i) that so long as the order of dismissal of petition for special leave to appeal by the Supreme Court stands the High Court would be *functus officio* and it could not review

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or after its judgment in the purported exercise of its inherent powers.

(ii) that once the Supreme Court has dismissed a petition for special leave to appeal in a criminal case the High Court ceases to have jurisdiction over that matter and has no power to alter, entertain or review application which would have the effect of disturbing the order made by the Supreme Court.

(iii) that there is a remedy available to the applicants to approach the Supreme Court under Article 137 of the Constitution to review its order dismissing their petition for special leave to appeal so as to have the matter reopened in the ends of justice.

(iv) that the inherent power of the High Court under s 561-A, Code of Criminal Procedure cannot be invoked where another remedy is available and further that the powers so exercised cannot be made to over-ride the express provisions of law.

(v) that the inherent powers which were preserved to the High Court under s. 561-A, Code of Criminal Procedure did not include power to review its judgment on grounds analogous to O. XLVII, r. 1, Code of Civil Procedure and so the High Court does not possess an inherent power to review its judgment on the grounds of discovery of new matters or evidence in criminal matters.

(vi) that we are here concerned with the review of an appellate order of the High Court and therefore s. 430, Code of Criminal Procedure will apply giving finality to such order and there being no provision in the Code of Criminal Procedure empowering the High Court to review its appellate judgment or order s. 561-A, Code of Criminal Procedure cannot over-ride an express provision of the Code by inventing a new category of inherent jurisdiction.

(vii) that there may be cases such as of clerical mistakes or hearing not according to law, etc. where the High Court may exercise its inherent jurisdiction to make consequential amendments in its order but there the inherent power is being exercised to further the ends of justice and the Court is not called upon to reassess the evidence or to introduce fresh material on the record for the purpose of deciding the matter

Sadhu Singh v. State ... 725

Revisions—Against the order of an Assistant Sessions Judge passed in appeal, if High Court will entertain it direct ... 538

Silver coins—Forming part of cash balance of assessee, ceasing to be legal tender coins—Profits by sale of them, whether liable to income-tax ... 84

Simple mortgage of villages by an Intermediary—*Consequences of vesting—Properties available in execution of mortgage*

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decree, whether include. (a) Bhumidhari in sir, khudkasht and intermediary's grove, (b) wells, trees in abadi *and buildings—Uttar Pradesh Zamindari Abolition and Land Reforms Act,* 1951, *ss.* 6(*a*)(*i*), 8 *and* 18—*Transfer of Property Act,* 1822, *s.* 73.

In execution of a decree for the recovery of money due on a simple mortgage by the sale of the proprietary rights of the intermediary in the villages mortgaged in 1914:

Held, (i) that the proprietary rights of the intermediary in *sir, khudkasht* and intermediary's groves vested after the requisite notification in the State of U. P. and the Bhumidhari tenure therein under s. 18 of the Act created by virtue of the cultivatory possession of such land is altogether a new right not covered by the mortgage and as such not available for the satisfaction of the mortgage decree;

(ii) (*obiter* and on concession) that the wells, trees in *abadi* and buildings apart from their site continue to belong to the intermediary and may be sold in execution of the mortgage decree.

Rana Sheo Amber Singh *v.* The Allahabad Bank Ltd., Allahabad . . 456

Societies Registration Act, 1860, *s.* 12—*If mandatory and not merely directory—If words 'purpose' or 'object' in the Act have been used synonymous—If general body of the Sammelan is included in the expression 'governing body' occurring in s.* 12 *of the Act—When an individual member of a society has right to bring suit in civil court—Is there automatic discharge of the receiver on termination of proceedings in which he was appointed*

The dispute relates to the Hindi Sahitya Sammelan, Prayag (Allahabad) which is a body registered under the Societies Registration Act of 1860. The Special Appeals were directed against the decree passed by OAK, J. in exercise of the original civil jurisdiction of the High Court in three consolidated suits.

The points that required determination were whether there has been any change of purpose of the Sammelan within the meaning of s. 12 of the Societies Registration Act because of the framing of rule 2 of the new Constitution of the Sammelan and whether s. 12 of the Societies Registration Act is merely directory and not mandatory.

It has been held—

(i) that the provisions of s. 12 of the Societies Registration Act are mandatory and not merely directory;

(ii) that the words 'purpose' or 'object' in the Societies Registration Act have been used synonymous and if s. 12 otherwise applies to the present case it cannot be made in

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applicable on the ground that the words used therein are 'purpose' or 'purposes' and not 'object' or 'objects';

(iii) that the general body of the Sammelan is included in the expression 'governing body' occurring in s. 12 of the Societies Registration Act;

(iv) that rule 2(a) of the new constitution of the Sammelan has not brought about any change in the 'purpose' of the Sammelan and there is thus no infringement of s. 12 of the Societies Registration Act;

(v) that the new constitution of the Sammelan was passed by contravening the provisions of r. 46 of the old constitution and on that ground has not been validly passed and cannot be treated to be effective;

(vi) that the new rules have not been legally framed and are consequently void;

(vii) that on the allegations that the entire proceedings were *ultra vires* and the new rules void it is open to individual members of a society to bring a suit and a civil court can take cognizance of the same;

(viii) that there is no automatic discharge of a receiver merely because the proceedings in which he is appointed terminates if the object for which he was appointed are not achieved;

(ix) that the receiver Sri Jagdish Swarup will continue to act as the receiver till the new office-bearers are elected and take charge of their respective offices.

Rai Ram Charan Agarwal *v* Shridhar Misra 691

Stamp Duty—*Presentation of a document to Collector for determination of—Power of Collector to impound the document after determining duty chargeable—Indian Stamp Act*, 1899, *ss* 31, 32 *and* 33.

Where an instrument, whether executed or not and whether previously stamped or not, is presented to the Collector under s. 31 of the Stamp Act, his power is limited to the determination of the duty chargeable on the same. The Collector becomes *functus officio* as soon as he decides that question and has, therefore, no power of impounding the instrument under s. 33 of that Act which is attracted on the production of a document as a piece of evidence or for being acted upon, registered or authenticated. It would be an extraordinary position if a person simply seeking the advice of the Collector on the stamp duty payable without desiring or proceeding any further in regard to that instrument should be subject to the liabilities involved in the use of unstamped or under-stamped instruments.

Government of Uttar Pradesh *v.* Raja Mohammad Amir Ahmad Khan 75

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State Government setting up conciliation boards and industrial tribunal—without any recital in the order as to its satisfaction about the existence of condition precedent of public safety—etc—Validity of the order . 149

Substitution of Legal representative of the sole plaintiff—*Application for, filed but no order of the court—Effect of the decree passed in the name of the deceased plaintiff and of the amended decree—Suit, whether may be deemed as still pending—Code of Civil Procedure (Act V of 1908), s 152, O. XX, r. 6 and O. XXII, r. 3*

On the death of the sole plaintiff as the *karta* of a joint Hindu family, an application for bringing on record his legal representative was duly filed but no order thereon was passed by the Court. The suit was later decreed in terms of a compromise which was signed and verified by the proposed legal representative. The defect was, however, noticed during the executive proceedings and an application for the amendment of the plaint and decree was made and allowed but the amendments were not actually incorporated and this was effected through a subsequent application. In an objection to the executability of the amended decree:

Held, (i) that the original decree being in the name of favour of a dead person was a nullity and the amended decree or ancillary orders could be no better than or different from the same;

(ii) that the substitution application having been duly filed within the prescribed time, the suit could not abate and must, therefore, be deemed to be pending from the stage or date of the application for substitution and should accordingly proceed further in regular course according to law.

Happy Valley Tea Co. *v* Darshanlal ... 663

Suppression of Immoral Traffic in Women and Girls Act, 1956, *s. 13—If a magistrate is competent to file a complaint against a person suspected of having committed an offence under the Act.*

The question referred to the Division Bench was "whether a magistrate is competent to file a complaint against a person suspected of having committed an offence under the Suppression of Immoral Traffic in Women and Girls Act of 1956".

The Court after considering in detail—

Held, (i) that it is not a condition precedent for the initiation of prosecution under the Suppression of Immoral Traffic in Women and Girls Act of 1956 against an offender that the information should be laid before a Magistrate by the Special Police Officer. The Act has not placed any fetters on the powers of a Magistrate to take cognizance of an offence from any source whatsoever,

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(ii) that there is no warrant for the proposition that cognizance of an offence under the Act cannot be taken except upon a report submitted by a special police officer,

(iii) that s. 3 of the Act does not create any bar to the filing of a complaint by a magistrate of the 1st class against a person suspected of having committed an offence under the Act and that the court of Magistrate as defined in the Act has jurisdiction to take cognizance of an offence on such complaint.

Smt. Shakila v. State 627

Temporary Sessions Judge—who takes over the file of another temporary sessions judge in the same sessions division, if can make a complaint under s. 476 Cr. P. C. in respect of the offence under s. 195, Cr. P. C. committed in the court of his predecessor. 361

Transfer of Property Act, 1882, *s. 106 as amended by U. P. Civil Laws (Reforms and Amendment) Act, 1954, it has retrospective effect and if affects the leave given in 1950.*

The question that arose for determination in the appeal was that if the U. P. Civil Laws (Reforms and Amendment Act) of 1954 amending s. 106 of the Transfer of Property Act did not have retrospective effect and did not affect the lease given in 1950 terminable at that time by a notice of 15 days expiring with the end of a month of the tenancy.

The Court, *held,*

(i) that the tenancy being from month to month for an indefinite period it commenced on the first of a month and ended on the last of the month, it again commenced on the first day of the next month and terminated on its last day and so on.

(ii) that the only right that the appellant possessed on 22nd November, 1954, just before the enactment of the amending act, was that his monthly tenancy for the month of November, 1954 would not be terminated except by a notice expiring on the last day of November, 1954, but he had no right whatsoever in respect of tenancies for future months.

(iii) that the U. P. Civil Laws (Reforms and Amendment Act) of 1954, which did not have retrospective operation, left only the right possessed on 22nd November, 1954, intact and could govern the accrual of similar right in future.

(iv) that the notice to quit was legal and the suit was rightly decreed.

K. K. Bakshi Dr. v. Ram Autar 224

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——s. 111(g)—Forfeiture of lease by denial of title—Rule of, whether applicable to lessor's assignee—Denial of title and *bona fide* putting assignee to proof of title—Distinction between 554

——s. 114—Forfeiture of lease for non-payment of rent—Relief against when available 530

Transferred employees—Life Insurance Corporation's power to alter terms regarding them 102

U. P. Civil Laws (Reforms and Amendment Act) of 1954—amending s. 106 of the Transfer of Property Act, if has retrospective effect 224

U. P. Industrial Disputes Act, 1947—Government order cl. 5(*a*) and cl. 23 under it—Construction of 493

U. P. Land Revenue Act, 1901, s. 85—Order of mutation court on the compromise application of the parties, if embodies the whole petition of compromise . . 46

U. P. Panchayat Raj Act, 1947, s. 12-C and R. 25—Construction of—Sub-Divisional Officer whether can stay transfer of charge pending disposal of election petition . 298

U. P. (Temporary) Control of Rent and Eviction Act, 1947, *s. 2(d), 3 and Code of Criminal Procedure*, 1898, *s. 10(2)—Interpretation of—District Magistrate, whether includes an Additional District Magistrate.*

By s. 3 Rent Control and Eviction Act no suit for the ejectment of a tenant could be filed without the permission of the District Magistrate except on one or more of the grounds specified in the section.

Where a suit for ejectment was filed on the permission of the Additional District Magistrate the defence raised was that the suit was incompetent as the necessary permission of the District Magistrate had not been obtained.

The High Court in second appeal having repelled the contention; on an appeal to the Supreme Court.

Held, that the District Magistrate within the meaning of s. 2(*d*) of the Act read with s. 10(2) of the Code of Criminal Procedure includes an Additional District Magistrate and no special authorization by the District Magistrate is necessary to empower the Additional District Magistrate to exercise powers under s. 3.

Held, further that the District Magistrate within the meaning of the Act is not a *persona designata* as *persona designata* is a person who is selected to act in his private capacity and not in his capacity as a judge.

The Central Talkies Ltd., Kanpur *v.* Dwarka Prasad 521

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——s. 3 *and Transfer of Property Act*, 1882, s. 106—*Notice of ejectment, terminating tenancy by 5th October*, 1954 *and to pay arrears of rent by 10th October*, 1954 *(i.e., within 30 days) held valid.*

Section 3 of the Rent Control and Eviction Act has no effect of suspending or overriding the provisions of section 106 Transfer of Property Act. The two provisions are independent of each other to be operative in their own respective fields.

In order to have an effective remedy of ejectment through a court of law landlord has two obstacles to overcome. In the first place he must determine the tenancy in one of the ways mentioned in the Transfer of Property Act. Without determining tenancy his right of re-entry does not accrue But the determination of tenancy under the Transfer of Property Act alone is not enough. If U P. Act III of 1947 applies and he wants to eject the tenant through a suit he has to comply with the provisions of s 3 of that Act also. If one of the contingencies mentioned in clause (i) of that section exists he may file a suit without the permission of the District Magistrate; otherwise he has to obtain that permission Both these obstacles can be overcome either at the same time or at different stages, one after the other. There appears to be nothing in either of the two provisions which may require the compliance of one must be made before the other. On the contrary it is noticeable that s. 3 of U. P Act III of 1947 seeks to put a restriction not on the landlord's right to determine the tenant's lease but on his right to file for the ejectment of the tenant as a consequence of the determination.

Rajendra Nath Razdan *v* Smt Lalli Devi . 120

——ss. 3 and 7-F—District Magistrate rejecting application for permission to institute suit for eviction—Revision dismissed by the Commissioner—Whether the State Government bound to send for the record of the Revisional Court exercising power under s. 7-F of the Act .. 282

United Provinces Tenancy Act and Uttar Pradesh Zamindari Abolition and Land Reforms Act, 1952, s. 9—*Zamindar entering possession over site and constructions in abadi when tenant absent temporarily from village—on return tenant obtains decree for possession—Before possession is restored—U. P. Zamindari Abolition and Land Reforms Act comes into force—With whom is the State Government to settle land under s. 9 of the Act—The term "belonging to or held by" in s 9 explained—Whether possession must have legal origin.*

A is the tenant of *B* who is the zamindar. *A* has some constructions over the site of which he is the lessee. Because of certain disturbances *A* left the village and *B* entered possession over the site, included it in his own compound and demolished the constructions. *B* made certain constructions of his

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own in the site in suit. On a suit by *A* against *B* for possession over the site the trial court come to the conclusion that *A* had left the village only temporarily with the intention of returning to the village and *B* had no right to enter into possession. The suit was decreed for possession over the site. *B* appealed and during the pendency of the appeal the Uttar Pradesh Zamindari Abolition and Land Reforms Act came into force. *B*, however, did not base his case on any provisions of the Act. On merits of the case the Judge dismissed the appeal and the decree in favour of *A* was confirmed.

In Second Appeal filed by *B* the contention is that on 1st July, 1952, when the Uttar Pradesh Zamindari Abolition and Land Reforms Act came into force *B* and not *A* was in possession of the constructions as well as of the site in suit and in view of s 9 of the Act the lower appellate court could not give a decree in favour of *A*. (Per MUKERJI and DWIVEDI, JJ. DESAI, C. J. dissenting)—

Under s. 9 the word 'hold' did not connote a title of a trespasser, but that it referred to a title that had a legal origin. A person who trespassed on the land of another and constructed a building on that land of the other, did not by that trespass, unless the right of the owner was barred by the law of limitation, acquires under the provisions of s. 9 of the Uttar Pradesh Zamindari abolition and Land Reforms Act, any title, right or interest to continue the building on that land or to have acquired any interest in that land.

It does not refer to a person, who has encroached upon the land of some person and erected a building over there or has taken possession over the building and the site thereof by ejecting forcibly a rightful claimant.

(*Per* DESAI, C. J.)—Though the suit of *A* was decreed, it was in appeal, and, since s. 9 of the Uttar Pradesh Zamindari Abolition and Land Reforms Act came into force on 1st July, 1952 the appellate court was bound to consider its provisions before deciding the appeal. It had not merely to see whether the decree passed by the lower court was correct or not; it had to deal with the matter as if it were itself trying the suit. When the only constructions that stood on the site belonged to and were in the occupation of *B* only *B* could continue to own and be in occupation of them. *A* who was not the owner and was not even in possession of them could not possibly be said to continue to own them after 1st July, 1952

Even if, the word 'held' is used to mean 'held under a title' or 'held lawfully' the respondents could not get the benefit of s. 9 because as explained above, the only building that stood on 1st July, 1952, was the cattle shed belonging to the appellant

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and in their own physical possession, and since no building belonging to the respondent stood on that date, no land could be deemed to be settled with them. On 1st July, 1952, they lost their right as licensees.

Buddhan Singh *v.* Nabi Bux 321

U. P. Zamindari Abolition and Land Reforms Act, 1951, *ss.* 6 (*a*) (i), 6(*h*), 8 and 18—Simple mortgage of villages by an intermediary—consequences of vesting—Properties available in execution of mortgage decree, whether include; (*a*) Bhumidhari in *Sir, Khudkasht* and intermediary's grove, (*b*) wells, trees in *abadi* and buildings. . 456

Uttar Pradesh Zamindari Abolition and Land Reforms Act, 1952, s. 9—The term 'belonging to or held by' in the section explained . . . 321

Winding up of a company—*Liability of delinquent directors, etc.,—Limitation for proceedings against Computation of,—Liability of legal representative of delinquent director Indian Companies Act,* 1913, *ss* 175(1) *and* (2), 235(1)

The period of "three years from the first appointment of a liquidator in the winding up . . ." for an application by the liquidator for assessing or enforcing the liability of a director or any other officer of the company for misapplication, etc. of any money or property of the company is to be computed not from the date of the appointment of the provisional liquidator under s. 175(2) of the Act but the appointment of the liquidator under s. 175(1) following or simultaneously with the order of the winding up.

The liability aforesaid being tortious or quasi-criminal is not enforceable against the heirs or legal representatives of the delinquent director or officer.

Vishwapal Sharma *v.* Sukh Sancharak Company Ltd. 570

Words and Phrases—'Rent in arrears' meaning of 530

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SUPREME COURT

APPELLATE CIVIL

Before the Hon'ble Mr. Justice Kapur and the Hon'ble Mr. Justice Shah

GOVERNOR-GENERAL-IN-COUNCIL (NOW UNION OF INDIA) (APPELLANT)

1961
January, 31.

v.

MUSADDI LAL (RESPONDENT)

Carriage by rail—*Non-delivery of goods to the consignee, whether covered by expression or cause 'loss, destruction or deterioration of goods'—Condition precedent of preferring the claim for compensation within the prescribed time, whether attracted—Indian Railways Act,* 1890, *s.* 77.

Failure to deliver the goods to the consignee is covered by the expression or cause 'loss, destruction or deterioration of goods' under s. 77 of the Railways Act and can not, therefore, be decreed unless the claim is preferred with the Railway Administration within six months from the date of delivery of goods for carriage.

The provisions of Articles 30 and 31 of the Limitation Act prescribing limitation respectively for suits for 'loss or injury to' and 'non-delivery or delay in delivery of' goods cannot be projected over the provisions of s. 77 of the Railways Act so as to hold that loss because of non-delivery of goods does not fall under that section.

Governor-General in Council v. *Mahabir Ram* (1) and *Jais Ram Ramrekha Das* v. *G. I. P. Railway* (2) over-ruled.

(1) I.L.R. [1953] 1 All. 64 (F. B.). (2) (1929) I.L.R. 8 Pat. 545.

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GOVERNOR-GENERAL-IN-COUNCIL v. MUSADDI LAL

Civil Appeal No. 313 of 1956, from the judgment and decree, dated the 25th July, 1952 of the Allahabad High Court in Second Appeal No. 2547, of 1946.

The facts appear in the judgment.

Ganapathy Iyer and *T. M. Sen*, Advocates for the appellant.

K. P. Gupta, Advocate for the respondent.

The following judgment of the Court was delivered by—

SHAH, J.:—On January 30, 1943, Bhola Nath Shambhu Ram as agent of the respondent L. Musaddi-lal delivered a bale of cloth to the railway administration E. I. Railway at Agra railway station for carriage by railway to the Chola station in the E. I. Railway. The consignment was accepted by the railway administration and a railway receipt was issued in the name of the consignor Bhola Nath Sambhu Ram. Bhola Nath Sambhu Ram endorsed the railway receipt in favour of the respondent and sent it by post to the respondent. The bale of cloth did not reach Chola, and the railway administration was unable despite efforts to trace it. There was correspondence between the railway administration and the respondent about the consignment. Failing to obtain satisfaction for the loss suffered by him, the respondent served a composite notice under s. 77 of the Indian Railways Act and s. 80 of the Civil Procedure Code on December 7, 1943 and thereafter on May 18, 1944, filed suit No. 288 of 1944 in the court of the II Munsif, Bulandshahr, for a decree for Rs.782-3-6 being the "price of the bale" and Rs.200 'for loss on account of non-delivery'. The railway administration resisted the claim on the pleas among others that the suit was not maintainable without an effective notice under section 77 of the Railways Act and that the suit was barred because at the date of the

institution of the suit, the period of limitation prescribed by Art. 31 of the Limitation Act had expired. The trial court decreed the suit. In appeal, the Additional Civil Judge, Bulandshahr, reversed the decree passed by the trial court and dismissed the suit. A Full Bench of the High Court of Allahabad reversed the decree passed by the first appellate court and restored the decree of the trial court. With certificate of fitness under Art. 133(1)(c) of the Constitution, this appeal has been preferred by the Union of India.

Section 77 of the Railways Act in so far as it is material provides:

> "A person shall not be entitled to . . . . compensation for the loss, destruction, or deterioration of . . . . goods delivered to be . . . . carried unless his claim to . . . . compensation has been preferred in writing by him or on his behalf with the railway administration within six months from the date of delivery of the . . . . goods for carriage by railway."

Section 77 mainfestly prescribes a condition precedent to the maintainability of a claim for compensation for goods lost, destroyed or deteriorated while in the custody of the railway administration. The notice prescribed was not served by the respondent upon the railway administration within six months from the date on which the goods were delivered for carriage, and *prima facie* the suit would be barred for non-compliance of a statutory condition precedent. But the respondent pleaded and the plea has found favour with the High Court that the suit filed by him was for compensation not for loss, destruction or deterioration of the goods, but "for non-delivery of the goods". In the view of the High Court, a claim for compensation for non-delivery

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GOVERNOR-GENERAL-IN-COUNCIL v. MUSADDI LAL

Shah, J.

of goods is a claim distinct from a claim for compensation for loss, destruction or deterioration of goods and to the enforcement of a claim of the former variety by action in a court of law s. 77 is not a condition precedent.

The railway administration in India is not an insurer of goods: it is merely a bailee of goods entrusted to it for carriage. Section 72 of the Railways Act prescribes the measure of the general responsibility of a railway administration as a carrier of goods. By that section, the responsibility of a railway administration for loss, destruction or deterioration of goods delivered to be carried by railway is subject to other provisions of the Act to be that of a bailee under section 152 and section 161 of the Indian Contract Act, 1872. Sections 151 and 152 of the Indian Contract Act deal with the duties of a bailee. If a bailee takes as much care of the goods bailed to him as a person of ordinary prudence would under similar circumstances of his own goods of the same bulk, quality and value as the goods bailed to him, in the absence of a special contract, he is not responsible for loss, destruction or deterioration of the goods bailed. By sections 160 and 161 of the Indian Contract Act, the bailee is under an obligation to return or deliver according to the bailor's direction the goods bailed as soon as the time for which the goods were bailed has expired or the purpose for which the goods were bailed has been accomplished and if on account of default of the bailee the goods are not returned, delivered or tendered at the proper time, he is responsible to the bailor for any loss, destruction or deterioration of the goods. The railway administration being a bailee of the goods delivered for carriage to it is therefore a bailee during the period when the goods remain in its custody for the purpose and in the course of carriage and for the purpose of delivery after the goods are carried to the destination. But the quantum of care which the railway administration is required to take is that care which it

would take having regard to the bulk, quality and value of its own similar goods.

Section 77 of the Railways Act is enacted with a view to enable the railway administration to make enquiries and if possible to recover the goods and to deliver them to the consignee and to prevent stale claims. It imposes a restriction on the enforcement of liability declared by s. 72. The liability declared by section 72 is for loss, destruction or deterioration. Failure to deliver is the consequence of loss, destruction or deterioration of goods; it does not furnish a cause of action on which a suit may lie against the railway administration, distinct from a cause of action for loss or destruction By the use of the expression, 'loss, destruction or deterioration', what is contemplated is loss or destruction or deterioration of the goods and the consequent loss to the owner thereof. If because of negligence or inadvertence or even wrongful act on the part of the employees of the railway administration, goods entrusted for carriage are lost, destroyed or deteriorated, the railway administration is guilty of failing to take the degree of care which is prescribed by section 72 of the Railways Act.

There are undoubtedly two distinct articles, Arts. 30 and 31 in the first schedule of the Indian Limitation Act dealing with limitation for suits for compensation against carriers. Article 30 prescribes the period of limitation for suits against a carrier for compensation against loss or injury to goods and Article 31 prescribes the period of limitation for suits for compensation against a carrier for non-delivery or delay in delivering the goods. The period of limitation under each of these articles is one year but the points of time from which that period is to be

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reckoned are different. But because the Indian Limitation Act provides different points of time from which the period of limitation is to run, it is not possible to infer that the claim covered by either article is not for compensation for loss, destruction or deterioration of the goods. We are unable to project the provisions of Articles 30 and 31 of the Limitation Act upon sections 72 and 77 of the Railways-Act and to hold that a suit for compensation for loss because of non-delivery of goods does not fall within section 77. The view we have expressed is supported by a large volume of authority in the courts in India—for instance *The Madras and Southern Mahratta Railway Co., Ltd.* v. *Haridoss Bannalidoss* (1), *Hill Sawyers and Co.* v. *Secretary of State* (2), *Martab Ali* v. *Union of India* (3), *Union of India* v. *Mitayagiri Pullappa* (4), *Assam Bengal Railway Co., Ltd.* v. *Radhika Mohan Nath and others* (5) and *Bengal Nagpur Railway Co* v. *Hamir Mull Chhagan Mull and another* (6).

The view expressed to the contrary in the Allahabad High Court in *Governor-General in Council and others* v. *Mahtbir Ram and another* (7) and by the Patna High Court in *Jais Ram Ramrekha Das* v. *G. I. P. Railway and another* (8), is in our judgment erroneous.

This appeal will therefore be allowed and the respondent's suit will stand dismissed As the Union of India was permitted to appeal for obtaining the decision of this Court which may settle the conflict of views even though the amount involved is small, we think that it is just and proper that there should be no order as to costs throughout.

Appeal allowed.

(1) I.L.R. (1918) 41 Mad. 871.
(2) I.L.R. [1921] 2 Lah. 183.
(3) (1954) 56 Bom. L.R. 150.
(4) I.L.R. [1958] A.P. 522.
(5) A.I.R. 1923 Cal. 307.
(6) I.L.R. [1926] 5 Pat. 106.
(7) I.L.R. [1953] 1 All. 64.
(8) I.L.R. [1929] 8 Pat. 545.

SUPREME COURT

APPELLATE CIVIL

Before the Hon'ble Mr. Justice Kapur and the Hon'ble Mr. Justice Shah

MESSRS. JETHANAND AND SONS (*Appellants*)

v.

STATE OF UTTAR PRADESH (*Respondent*)

1961

February, 6

[ON APPEAL FROM THE HIGH COURT AT ALLAHABAD]

Appeal to Supreme Court—*Order of remand for de novo trial, whether subject to and fit for appeal—Constitution of India, 1950 Article 133(1)(c)—Code of Civil Procedure, 1908, s. 109(1)(c).*

An order of remand for a *de novo* trial is not a judgment, decree or final order within the meaning of Article 133 of the Constitution and is, therefore, unappealable to the Supreme Court. The inconsistency (re the finality of the Order) between s. 109 of the Code of Civil Procedure and Article 133 of the Constitution was removed by the Civil Procedure Code Amendment Act, 1955. But even before the Amending Act, the provisions under the Code being expressly made subservient to those in the Constitution, the position was in effect the same.

The observation of the High Court on a point remanded for retrial which would not be binding in the *de novo* trial can not be said to raise a question of law of great public or private importance so as to justify a certificate of fitness for appeal to Supreme Court under Article 133(1)(*c*) of the Constitution.

High Court's certificate of fitness for appeal to Supreme Court vacated and appeals dismissed.

V. M. Abdul Rahman v. *D. K. Cassim & Sons* (1) referred to.

Civil Appeals Nos. 421 to 423 of 1957 from the judgment and order, dated the 18th February, 1955, of the Allahabad High Court (Lucknow Bench) at Lucknow in F. A. F. O. Nos. 11 to 13 of 1953.

The facts appear in the judgment.

J. B. Dadachanji, Advocate of Messrs. Rajindar Narain and Co. for the appellants (in all the appeals).

(1) (1933) L.R. 60 I.A. 76.

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C. B. Agarwala, Senior *Advocate* (*C. P. Lal*, Advocate, with him) for the respondent (in all the appeals).

The following judgment of the Court was delivered by—

SHAH, J.:—These three appeals were filed by the appellants Messrs. Jethanand & Sons with certificate of fitness granted under Article 133(1)(c) of the Constitution by the High Court of Judicature at Allahabad.

The appellants entered into three separate contracts with the Government of the United Provinces (now called the State of Uttar Pradesh) on March 20, 1947, May 27, 1947, and June 28, 1947, for the supply of stone ballast at Shankar Garh, District Allahabad. The contracts which were in identical terms contained the following arbitration clause:

> "All disputes between the parties hereto arising out of this contract whether during its continuance or after its rescission or in respect of the construction or meaning of any clause thereof or of the tender, specifications and conditions or any of them or any part thereof respectively or anything arising out of or incident thereto for the decision of which no express provision has hereinbefore been made, shall be referred to the Superintending Engineer of the Circle concerned and his decision shall in all cases and at all times be final, binding and conclusive between the parties."

Pursuant to the contracts, the appellants supplied stone ballast. Thereafter, purporting to act under clause (16) of the agreements, the Executive Engineer, Provincial Division referred certain disputes between the appellants and the State of Uttar Pradesh, alleged to arise out of the performance of the contracts, to arbitration of the Superintending Engineer of the Circle concerned. The Superintending Engineer required the

appellants to appear before him at the time fixed in the notices. The appellants by their letter dated May 31, 1951, declined to submit to the jurisdiction of the Superintending Engineer, and informed him that if he hears and determines the cases *ex parte*, the "decisions will not be binding" on them. On February 7, 1953, the Superintending Engineer made and published three awards in respect of the disputes arising under the three contracts and filed the same in the court of the Civil Judge, Lucknow. The appellants applied for setting aside the awards alleging that the contracts were fully performed and that the dispute alleged by the State of Uttar Pradesh to have arisen out of the contracts could not arise after the contracts were fully performed and that the State could not refer those alleged disputes to arbitration. They also contended that the awards were not valid in law because on the arbitration agreements, action was not taken under s 20 of the Arbitration Act. The Civil Judge, Lucknow, held that the disputes between the parties were properly referred to the Superintending Engineer by the State of Uttar Pradesh and that the awards were validly made. Against the orders passed by the Civil Judge, Lucknow, three appeals were preferred by the appellants to the High Court of Judicature at Allahabad.

The High Court set aside the orders by the Civil Judge and remanded the cases to the Trial Judge with a direction that he to allow the appellants and if need be, the respondent to amend their pleadings, and frame all issues that arise out of the pleadings and allow the parties an opportunity to place such evidence as they desire and decide the case on such evidence. In the view of the High Court no proper notice of the filing of the awards was served upon the appellants and that they were "seriously handicapped in their reply by the course which had been adopted both by the court and the

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arbitrator in the conduct of the proceedings in court." On the applications filed by the appellants, the High Court granted leave to appeal to this court under Article 133(1)(c) of the Constitution, certifying that the cases were fit for appeal to this court

Counsel for the respondent has urged that the High Court was incompetent to grant certificate under Article 133(1)(c) of the Constitution.

The order passed by the High Court was manifestly passed in exercise of the inherent power to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court. Under Article 133 of the Constitution, an appeal lies to this court from any judgment, decree or *final order* in a civil proceeding of a High Court if the High Court certifies that:

(a) .....

(b) ....or

(c) "the case is a fit one for appeal to the Supreme Court".

In our view, the order remanding the cases under s. 151 of the Civil Procedure Code is not a judgment, decree or *final order* within the meaning of Article 133 of the Constitution. By its order, the High Court did not decide any question relating to the rights of the parties to the dispute. The High Court merely remanded the cases for retrial holding that there was no proper trial of the petitions filed by the appellants for setting aside the awards. Such an order remanding the cases for retrial is not a final order within the meaning of Article 133(1)(c). An order is final if it amounts to a final decision relating to the rights of the parties in dispute in the civil proceeding. If after the order, the civil proceeding still remains to be tried and the rights in dispute between the parties have to be determined,

the order is not a final order within the meaning of Article 133. The High Court assumed that a certificate of fitness to appeal to this court may be issued under section 109(1)(*c*) of the Code of Civil Procedure, even if the order is not final, and in support of that view, they relied upon the judgment of the Judicial Committee of the Privy Council in *V. M. Abdul Rahman and others* v. *D. K. Cassim & Sons and another* (1). But section 109 of the Code is, now made expressly subject to Chapter IV, Part V of the Constitution and Article 133(1)(*c*) which occurs in that chapter authorises the grant of a certificate by the High Court only if the order is a final order. The inconsistency between section 109 Civil Procedure Code and Article 133 of the Constitution has now been removed by the Code of Civil Procedure (Amendment) Act 66 of 1955. But even before the amending Act, the power under s. 109(1)(*c*) being expressly made subject to the Constitution, an appeal lay to this Court only against judgments, decrees and final orders.

Again, the orders passed by the High Court did not raise any question of great public or private importance. In the view of the High Court, the applications for setting aside the awards filed by the appellants were not properly tried and therefore the cases deserved to be remanded to the court of first instance for trial *de novo*. The High Court granted leave to the parties to amend their pleadings; they also directed the Civil Judge to frame "*all the issues* that arise and allow the parties an opportunity of adducing such evidence as they desired". It was an order for trial *de novo* on fresh pleadings and on *all issues* that may arise on the pleadings. Evidently, any decision given by the High Court in the course of the order would not in that trial *de novo* be binding and the cases will have to be tried afresh by the Civil

(1) (1933) L.R. 60 I.A. 76.

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Judge The High Court was of the view that the interpretation of para. 3 of the first schedule of the Indian Arbitration Act raised a substantial question of law. But by the direction of the High Court, this question was also left open to be tried before the Civil Judge. We fail to appreciate how an observation on a question which is directed to be retried can still be regarded as raising a question of law of great public or private importance justifying grant of a certificate under Article 133(1)(c) of the Constitution.

We accordingly vacate the certificate granted by the High Court and dismiss these appeals with costs. One hearing fee.

Appeal dismissed.

SUPREME COURT

APPELLATE CRIMINAL

Before the Hon'ble Mr. Justice Subba Rao and the Hon'ble Mr. Justice Raghubar Dayal.

TEEKA AND OTHERS

v.

STATE OF UTTAR PRADESH

1961
February, 18

[ON APPEAL FROM THE HIGH COURT AT ALLAHABAD]

Attachment of moveables—*Custody of goods attached—Attaching Officer entrusting custody to* supardar *who keeps them in the enclosure of the decree-holder—Legality and nature of decree-holder's custody—Removal of goods with use of force by the owner—Liability of the owner—Code of Civil Procedure,* 1908 *O. XXI, r.* 43 *and r.* 116 *framed by Allahabad High Court—Indian Penal Code,* 1860, *ss.* 424, 24 *and* 23.

Under O. XXI *r.* 43 read with *r.* 116 framed by the Allahabad High Court under the Code of Civil Procedure, it is competent for the Attaching Officer to keep the goods in the custody of a *supardar* and for the latter to entrust it to the decree-holder. Decree-holder would in such a case, be the bailee of the *supardar* and his possession would be on behalf of or as agent of the court.

Where a property has been legally attached by a court, its possession passes from the owner to the court or its agent. If the owner, during the subsistence of attachment resorts to force and takes back possession of the property, he acts unlawfully and causes wrongful loss to the court. His act, therefore, amounts to dishonest removal of property and is punishable under s. 424 of the Penal Code.

Emperor v. Ghasi (1) over-ruled. *Sarsar Singh* v. *Emperor* (2) and *Emperor* v. *Gurdial* (3) distinguished on the ground that the attachment in these cases was illegal.

(1) (1930) I.L.R. 52 All. 214. (2) (1934) 35 Cr. L. J 1307 (All.)
(3) (1933) I.L.R. 55 All. 119

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Criminal Appeals nos. 79 and 89 of 1959 from the judgment and order, dated the 6th May, 1959 of the Allahabad High Court in Criminal Appeal no. 1224 of 1957.

The facts appear in the judgment.

A. S. R. Chari, Senior Advocate (*R. K. Garg, D. P. Singh, S. C. Agarwal* and *M. K. Ramamurthi*, Advocates, with him) for the appellants

G. C. Mathur and *C. P. Lal*, Advocates, for the respondents. (In both the appeals).

The following judgment of the Court was delivered by—

SUBBA RAO, J.—These two appeals are directed against the judgment of the High Court of Judicature at Allahabad dismissing the appeal preferred by the appellants and maintaining the convictions and sentences imposed on them by the learned Sessions Judge, Meerut, under section 147, section 424, section 452, section 325, read with section 149, and section 323, read with section 149, of the Indian Penal Code.

Briefly stated the case of the prosecution is as follows. One Har Narain had obtained a decree from the court of the Additional Munsif, Ghaziabad, against one Sunehri Jogi for a sum of money. In execution of that decree the Munsif issued a warrant for the attachment of the judgment-debtor's property. The *amin* to whom the said warrant was entrusted attached, *inter alia*, three buffaloes and two cows, which were in the house of the judgment-debtor, as his property. The *amin* kept the cattle in the custody of one Chhajju, the *sapurdar*. As the said *sapurdar* had no accommodation in his house for keeping the animals, he kept them for the night in the enclosure of the decree-holder with his permission. The next day, at about 7 a.m., the nine appellants, armed with *lathies*, went to the enclosure of the decree-holder and began to untie two of the attached buffaloes. The decree-holder, his son and his nephew protested

against the acts of the appellants whereupon the appellants struck the three inmates of the house with *lathies*, and when P. W.-4 intervened, they struck him also with *lathies*. Thereafter, appellants 1, 2, and 3 took away the two buffaloes followed by the other appellants.

The defence version is that on 1st June, 1955, at about 7 a.m., the first appellant, Tika, was taking his two buffaloes for grazing when Har Narain and 11 others came with the *amin* and forcibly snatched the said buffaloes, that when Tika objected to it, those 12 persons assaulted him with *lathies*, that when appellant 2, Raja Ram, came there, he was also assaulted, and that Tika and Raja Ram used their *lathies in self-defence*.

The learned Sessions Judge, on a consideration of the evidence, held that the cattle were attached on the evening of 31st May, 1955, and that, after their seizure, they were kept in the house of Har Narain. The Sessions Judge disbelieved the defence version that the accused gave the beating to Har Narain and others at 11 a.m. on 1st June, 1955, in self-defence. On that finding, he convicted the accused as aforesaid. On appeal, the learned Judges of the High Court accepted the finding arrived at by the learned Sessions Judge and confirmed the convictions and the sentences passed by him on the accused, but directed the various sentences to run concurrently. Hence the appellants have preferred these two appeals against the judgment of the High Court.

Learned counsel for the appellants raised before us the following contentions: (1) The attachment of the buffaloes was illegal and, therefore, the appellants in taking away their own buffaloes from the possession of the decree-holder did not commit any offence under section 424 of the Indian Penal Code. (2) Even if the

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attachment was valid, neither the *amin* had any authority to keep the attached buffaloes in the custody of the *sapurdar*, nor the *sapurdar* had any power to keep them in the custody of the decree-holder, and therefore the decree-holder's possession was illegal and the appellants in taking away the buffaloes did not commit any offence within the meaning of sec. 424 of the Indian Penal Code. (3) The appellants also did not commit any offence under section 441 of the Indian Penal Code, as they had no intention to commit an offence or cause annoyance to the decree-holder, but they entered the house of the decree-holder only to recover their buffaloes from illegal custody. (4) The appellants did not commit an offence under section 325, read with sections 147 and 149 of the Indian Penal Code, as their common object was not to cause grievous hurt to the decree-holder and others, but was only to recover their buffaloes illegally detained by the decree-holder

The first two contentions may be considered together. The material facts relevant to the said contentions may be stated. Har Narain in execution of his decree against Sunehri Jogi attached the buffaloes that were in the house of the judgment-debtor. Tika, appellant 1, filed a claim-petition—it is common case that subsequent to the incident his claim-petition was allowed. In the claim-petition, the High Court pointed out that Tika did not question the validity of the attachment but only set up his title to the buffaloes. Indeed, his defence in the criminal case also was not that the incident happened when the attached buffaloes were in the house of the decree-holder but that the incident took place before the attachment was effected. Before the Sessions Judge no point was taken on the basis of the illegality of the attachment. For the first time in the High Court a point was sought to be made on the

ground of the illegality of the attachment, but the learned Judges rejected the contention not only on the ground that official acts could be presumed to have been done correctly but also for the reason that the appellants did not question the legality of the attachment in the claim-petition. That apart, P.W. 1, the *amin*, was examined before the Sessions Judge. He deposed that he had attached the heads of cattle from the house of the judgment-debtor, Sunehri Jogi, and that he had prepared the attachment list He further deposed that the warrant of attachment received by him was with him. A perusal of the cross-examination of this witness discloses that no question was put to him in regard to any defects either in the warrant of attachment or in the manner of effecting the attachment. In these circumstances, we must proceed on the assumption that the attachment had been validly made in strict compliance with all the requirements of law.

If so, the next question is, what is the effect of a valid attachment of moveables? Order XXI, rule 43, of the Code of Civil Procedure describes the mode of attachment of movable properties other than agricultural produce in the possession of the judgment-debtor. It says that the attachment of such properties shall be made by the actual seizure, and the attaching officer shall keep the attached property in his own custody or in the custody of one of his subordinates and shall be responsible for the due custody thereof The relevant rule framed by the Allahabad High Court is rule 116, which reads.

> "Live-stock which has been attached in execution of a decree shall ordinarily be left at the place where the attachment is made either in custody of the judgment-debtor on his furnishing security, or in that of some land-holder or other respectable person willing to undertake the responsibility of its

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custody and to produce it when required by the court."

The aforesaid rule also empowers the attaching officer to keep the animals attached in the custody of a *sapurdar* or any other respectable person. Attachment by actual seizure involves a change of possession from the judgment-debtor to the court; and the rule deals only with the liability of the attaching officer to the court. Whether the *amin* keeps the buffaloes in his custody or entrusts them to a *sapurdar*, the possession of the *amin* or the *sapurdar* is in law the possession of the court and, so long as the attachment is not raised, the possession of the court continues to subsist. Would it make any difference in the legal position if the *sapurdar*, for convenience or out of necessity, keeps the said animals with a responsible third party? In law the said third party would be a bailee of the *sapurdar*. Would it make any difference in law when the bailee happens to be the decree-holder? Obviously it cannot, for the decree-holder's custody is not in his capacity as decree-holder but only as the bailee of the *sapurdar*. We, therefore, hold that the decree-holder's possession of the buffaloes in the present case was only as a bailee of the *sapurdar*.

But it is said that even on that assumption, appellant 1, being the owner of the buffaloes, was not guilty of an offence under section 424 of the Indian Penal Code, as he could not have acted dishonestly in trying to retrieve his buffaloes as their owner from the custody of the court's officer or his bailee. This argument turns upon the provisions of section 424 of the Indian Penal Code. The material part of section 424 of the said Code reads:

> "Whoever dishonestly or fraudulently removes any property of himself or any other person, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both."

The necessary condition for the application of this section is that the removal should have been made dishonestly or fradulently. Under section 24 of the Indian Penal Code, "Whoever does anything with the intention of causing wrongful gain to one person or wrongful loss to another person is said to do that thing 'dishonestly'. Section 23 defines "wrongful gain" and "wrongful loss". "Wrongful gain" is defined as gain by unlawful means of property to which the person gaining is not legally entitled; and "wrongful loss" is the loss by unlawful means of property to which the person losing is legally entitled Would the owner of a thing in court's custody have the intention of causing wrongful gain or wrongful loss within the meaning of section 23 of the Indian Penal Code? When an attachment is made, the legal possession of a thing attached vests in the court. So long as the attachment lasts or the claim of a person for the thing attached is not allowed, that person is not legally entitled to get possession of the thing attached. If he unlawfully takes possession of that property to which he is not entitled he would be making a wrongful gain within the meaning of that section. So too, till the attachment lasts the court or its officers are legally entitled to b in possession of the thing attached If the owner removes it by unlawful means, he is certainly causing wrongful loss to the court or its officers, as the case may be, within the meaning of the words "wrongful loss". In the present case when the owner of the buffaloes removed them unlawfully from the possession of the decree-holder, the bailee of the *sapurda*, he definitely caused wrongful gain to himself and wrongful loss to the court. In this view, we must hold that appellant 1 dishonestly removed the buffaloes within the meaning of section 424 of the Indian Penal Code and, therefore, he was guilty under that section.

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Now we shall proceed to consider some of the decisions cited at the Bar in support of the contention that under no circumstances the owner of a thing would be guilty of an offence under section 424 of the Indian Penal Code, if he removed it from an officer of a court, even if he was in possession of it under a legal attachment.

Reliance is placed upon the decision of the Court of Criminal Appeal in *Rex v. Thomas Knight* (1), where a prisoner, the owner of the fowls, took them away from the possession of the Sheriff's officer, the court held that the prisoner was not guilty of larceny. "Larceny is the wilful and wrongful taking away of the goods of another against his consent and with intent to deprive him permanently of his property". There are essential differences between the concept of larceny and that of theft; one of them being that under larceny the stolen property must be the property of someone whereas under theft it must be in the possession of someone. It would be inappropriate to apply the decision relating to larceny to an offence constituting theft or dishonest or fraudulent removal of property under the Indian Penal Code, for the ingredients of the offences are different. In *Sarsar Singh v. Emperor* (2), BAJPAI, J., held that "the mere fact that the judgment-debtor, who is entitled to remove his crops which are not validly attached, has removed them does not prove that he has done so dishonestly". There the attachment was made in derogation of the provisions of Order XXI, rule 44, Civil Procedure Code; and the Court held that the attachment was illegal and, therefore, the property would not pass from the judgment-debtor to the court. It further held that under such circumstances the court could not presume that the act of removal was done dishonestly within the meaning of section 24, I. P. C. This decision does not

(1) (1908) 25 T.L.R. 87. (2) (1934) 35 Cr. L. J. 1307

help the appellants, as in the present case the attachment was legal. SEN, J., in *Emperor* v. *Ghasi* (1), went to the extent of holding that the owner cutting and removing a portion of the crops under attachment in execution of a decree and in the custody of a *shehna* did not constitute an offence under section 424, Indian Penal Code. The learned Judge observed at page 216:

> "If they were the owners of the crop and removed the same, their conduct was neither dishonest nor fraudulent."

The learned Judge ignored the circumstance that the attachment of the crops had the legal effect of putting them in the possession of the court. For the reason given by us earlier, we must hold that the case was wrongly decided. In *Emperor* v. *Gurdial* (2), PULLAN, J., held that the owner by removing the attached property from the possession of the custodian and taking it into his own use, did not commit an offence under section 424, Indian Penal Code. But in that case also the attachment was illegal.

But there is a current of judicial opinion holding that where there was a legal attachment, a third party claiming to be the owner of the moveables attached would be guilty of an offence under section 424 or section 379, Indian Penal Code, as the case may be, if he removed them from the possession of the court or its agent.

Where a revenue court had attached certain plots and certain persons were appointed as custodians of the crop standing on the plots and accused cut and removed the crop in spite of knowledge of the promulgation of the order of attachment, the Allahabad High Court held in *Dalganjan* v. *State* (3) that the removal of the crop by the accused was dishonest and that the conviction of the accused under section 379, Indian Penal

(1) (1930) I.L.R. 52 All. 214. (2) (1934) I.L.R. 55 All. 119.
(3) A.I.R. 1956 All. 680.

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RAO, J.

Code, was proper. The learned Judges said, "Since the possession passed from the accused to the custodians, the cutting of the crop by the accused in March 1951, was dishonest". In *State* v. *Ramu* (1) the Rajasthan High Court held that where a person takes away the attached property from the possession of the *supurdar*, to whom it is entrusted, without his consent, and with the knowledge that the property has been attached by the order of a court, he will be guilty of committing theft, even though he happens to be the owner of the property. Though this was a case under section 379, Indian Penal Code, the learned Judges considered the scope of the word "dishonestly" in section 378, which is also one of the ingredients of the offence under section 424, Indian Penal Code. WANCHOO, C. J., observed at page 775, thus:

> "There is no doubt that loss of property was caused to Daulatram inasmuch as he was made to lose the animals. There is also no doubt that Daulatram was legally entitled to keep the animals in his possession as they were entrusted to him. The only question is whether this loss was caused to Daulatram by unlawful means. It is to our mind obvious that the loss in this case was caused by unlawful means because it can never be lawful for a person, even if he is the owner of an animal, to take it away after attachment from the person to whom it is entrusted without recourse to the court under whose order that attachment has been made."

These observations apply with equal force to the present case. A division bench of the Allahabad High Court in *Emperor* v. *Kamla Pat* (2) considered the meaning of the word "dishonestly" in the context of a theft of

(1) (1956) I L.R. 6 Raj. 752 (2) (1926) I.L.R. 48 All. 368.

property from the possession of a receiver. SULAIMAN, J., observed at page 372 thus:

> "Therefore when a property has been attached under an order of a civil court in execution of a decree, possession has legally passed to the court. Any person who takes possession of that property subsequent to that attachment would obviously be guilty under section 379 of the Indian Penal Code, if he knew that the property had been attached and was therefore necessarily acting dishonestly."

We need not multiply decisions, as the legal position is clear, and it may be stated as follows: Where a property has been legally attached by a court, the possession of the same passes from the owner to the court or its agent. In that situation, the owner of the said property cannot take the law into his own hands, but can file a claim-petition to enforce his right. If he resorts to force to get back his property, he acts unlawfully and by taking the property from the legal possession of the court or its agent, he is causing wrongful loss to the court. As long as the attachment is subsisting, he is not entitled to the possession of the property, and by taking that property by unlawful means he is causing wrongful gain to himself. We are, therefore, of the view that the appellants in unlawfully taking away the cattle from the possession of the decree-holder, who is only a bailee of the *sapurdar*, have caused wrongful loss to him and therefore they are guilty of an offence under section 424, Indian Penal Code.

The next contention turns upon the provisions of section 441 of the Indian Penal Code. The argument is that the appellants did not commit trespass with intention to commit an offence or intimidate, insult or annoy any person in possession of such property. A distinction is made between intention and knowledge.

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It is said that the appellants did not trespass into the house of the decree-holder with any such intention as mentioned in that section. But in this case we have no doubt, on the evidence, that the appellants entered the house of the decree-holder with intent to remove the attached cattle constituting an offence under section 424 of the Indian Penal Code. The appellants are, therefore, guilty of the offence and have been rightly convicted under section 441 of the Indian Penal Code.

The last contention is that the principal object of the accused was to get back their cattle which had been illegally attached and that their subsidiary object was to use force, if obstructed, and that in the absence of a specific charge in respect of the use of force the accused should not have been convicted of what took place in furtherance of the subsidiary object. The relevant charge reads thus:

> "That you, on or about the same day at about the same time and place voluntarily caused such injuries on the persons of Om Prakash, Har Narain, Jhandu and Qabul, that if the injuries would have caused the death of Har Narain, you would have been guilty of murder and thereby committed an offence under section 307 read with section 149, Indian Penal Code and within the cognizance of the court of Sessions."

Though section 149 of the Indian Penal Code is mentioned in the charge, it is not expressly stated therein that the members of the assembly knew that an offence under section 307 of the Indian Penal Code was likely to be committed in prosecution of the common object of that assembly. Under section 537 of the Code of Criminal Procedure, no sentence passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of any error, omission or

irregularity in the charge, unless such error, omission or irregularity has in fact occasioned a failure of justice. The question, therefore, is whether the aforesaid defect in the charge has in fact occasioned a failure of justice. The accused knew from the beginning the case they had to meet. The prosecution adduced evidence to prove that the accused armed themselves with *lathis* and entered the premises of the decree-holder to recover their cattle and gave *lathi* blows to the inmates of the house causing thereby serious injuries to them. Accused had ample opportunity to meet that case. Both the courts below accepted the evidence and convicted the accused under section 307, read with section 149, Indian Penal Code. The evidence leaves no room to doubt that the accused had knowledge that grievous hurt was likely to be caused to the inmates of the decree-holder's house in prosecution of their common object, namely, to recover their cattle. We are of the opinion that there is no failure of justice in this case and that no case has been made out for interference

No other point was raised before us In the result, the appeals fail and are dismissed.

Appeals dismissed.

SUPREME COURT

APPELLATE CIVIL

Before the Hon'ble Mr. Justice Gajendragadkhar and the Hon'ble Mr. Justice Das Gupta.

SARDA PRASAD AND OTHERS (APPELLANTS)

v.

1961
February, 20

LALA JUMNA PRASAD AND OTHERS (RESPONDENTS)

[ON APPEAL FROM THE HIGH COURT AT ALLAHABAD]

Execution of Decree *for partition in favour of a joint Hindu family including minor sons—Limitation for, whether suspended during minority of sons—Indian Limitation Act, 1908, s. 7—Code of Civil Procedure, 1908. O. XXXII, rr. 6 and 7.*

The word 'discharge' in s. 7 of the Limitation Act is not limited to discharge of monetary claims only but covers discharge or satisfaction of all other liabilities, e.g. taking possession of property.

The managing member of a joint Hindu family can give a valid discharge of liability under a partition decree by accepting delivery of possession on behalf of his minor sons and, therefore, time would run against all the members of the joint family from the date of the decree. The limitation or durability of guardian *ad litem* under O. XXXII, rr. 6 and 7 of the Code of Civil Procedure has no application to such cases.

Case law discussed.

Civil Appeal no. 276 of 1956 from a judgment and decree, dated the 15th October, 1954 of the Allahabad High Court in Execution First Appeal no 224 of 1951.

The facts appear in the judgment.

S. P. Sinha, Senior Advocate (*Tiryugi Narain* Advocate with him) for the appellants.

G. C. Mathur, Advocate for respondent no. 1.

The following Judgment of the Court was delivered by—

DAS GUPTA, J.—This appeal raises a question of limitation in execution proceedings. The decree sought to be executed was made by the Civil Judge, Kanpur, on 2nd September, 1938, in a suit for partition brought by two brothers Jumna Prasad and Devi Prasad and two minor sons of Jumna Prasad, against Gajju Lal, his son Jawala Prasad, the four minor sons of Jawala Prasad—Sharda Prasad, Dharam Pal, Ram Pal and Krishna Pal, and one Smt. Sundari. By the decree one of the properties, a house formerly bearing no. 36/22 and now 36/58, Etawa Bazar, Kanpur, was awarded along with other properties to the defendants in the suit. The present application for execution was made by the four brothers, Sharda Prasad, Dharam Pal, Ram Pal and Krishna Pal on 23rd November, 1949. The prayer was that these applicants may be delivered possession over this Etawa Bazar house along with Gajju Lal, Jawala Prasad and Smt. Sundari on dispossession of Jumna Prasad and Devi Prasad. It is stated in the application that all these applicants had "up till now been minors and one of them is still a minor and so no question in respect of time arises". This, it is important to note, was the first application for execution of the partition decree.

A number of objections were raised; but the principal objection and the only one with which we are concerned in this appeal was that the application was barred by time. The decision of this question depended on the answer to the question raised on behalf of the opposite-parties that Jawala Prasad one of the persons entitled jointly with these applicants to make an application for the execution of the decree could have given a discharge of the liability under the decree without the concurrence of his minor sons and so time ran under section 7 of the Limitation Act against them also from the date of the decree.

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Das Gupta, J.

The Trial Court did not feel satisfied that Jawala Prasad could give a valid discharge and held accordingly that the application was within time.

On appeal the High Court held that Jawala Prasad as the Karta of the Hindu Joint Family could act on behalf of the entire joint family in taking possession of the house allotted to the defendants and delivery of such possession could discharge the liability *qua* the entire joint family and held accordingly that the application was barred by limitation. The High Court however granted a certificate under Article 133(1) (*c*) of the Constitution and on that certificate this appeal has been filed by the applicants for execution.

Two contentions were raised on behalf of the appellants in support of the plea that the High Court erred in holding that the application for execution was barred by limitation. First, it is urged that section 7 of the Limitation Act does not apply at all to a partition decree. The second contention is that in any case Jawala Prasad could not give a valid discharge of the liability under the decree in view of the provisions of Order 32 of the Code of Civil Procedure.

On the first contention the argument is that the word "discharge" is appropriate only in respect of a monetary claim and is wholly inappropriate in respect of any decree for possession whether on partition or otherwise. There is, in our opinion, no substance in this argument. The mere fact that the two illustrations to section 7 are in respect of debts is no ground for thinking that the provisions of section 7 are limited to suits or decrees on monetary claims only. Nor can we see any reason to think that the word "discharge" can refer only to debts. Discharge means, to free from liability. The liability may be in respect of monetary claims, like debts; it may be in respect of possession of property; it may be in respect of taking some order as regards property; it may

be in respect of many other matters. Except in the case of declaratory decrees or decrees of a similar nature, the decree in favour of one person against another requires the person against whom the decree is made liable to do something or to refrain from doing something. This liability is in a sense a debt which the party is in law bound to discharge. The ordinary use of the word "judgment-debtor" to denote a person against whom a decree has been made makes a clear recognition of this It is worth mentioning in this connection that the Code of Civil Procedure itself defines "judgment-debtor" to mean "any person against whom a decree is passed or an order capable of execution has been made."

It is helpful to notice in this connection the provisions of section 8 of the Limitation Act that "nothing in section 6 or section 7 applies to suits to enforce rights of pre-emption". If section 7 had been applicable merely to litigation for monetary claims it would have been unnecessary and indeed meaningless to take the special step of exempting suits to enforce rights of pre-emption from the operation of section 7. This is a further reason in support of the conclusion that the word "discharge" in section 7 is not limited to discharge of monetary claims only but also to discharge or satisfaction of all other liabilities as well We, therefore, hold that the first argument raised on behalf of the appellants has no substance.

Equally untenable is the second argument that the provisions of Order 32 of the Code of Civil Procedure debar the manager of a Hindu joint family from giving discharge in respect of a liability to deliver properties. Under the Hindu Law the Karta of a Hindu joint family represents all the members of the family and has the power and duty to take action which binds the family in connection with all matters of management of the

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family property. Clearly, therefore, when in respect of a transaction of property possession has to be received by the several members of the family, it is the Karta's duty and power to take possession on behalf of the entire family, including himself, the members of the family who are *sui juris* as well as those who are not.

When any minor member of a joint family is a party to a proceeding in a court he has however to be represented by a next friend appointed by the court and where somebody other than the managing member of the family has been appointed a guardian *ad litem* there might be difficulty in the way of the managing member giving a discharge on behalf of the minor. Where however the managing member himself is the guardian *ad litem* the only difficulty in the way of action being taken by him on behalf of a minor is to the extent as mentioned in Order 32, rr. 6 and 7. In *Ganesha Row* v. *Tuljaram Row* (1) the Judicial Committee pointed out that:

> "No doubt a father or managing member of a joint Hindu family may, under certain circumstances and subject to certain conditions, enter into agreements which may be binding on the minor members of the family. But where a minor is party to a suit and a next friend or guardian has been appointed to look after the rights and interests of the infant in and concerning the suit, the acts of such next friend or guardian are subject to the control of the Court."

In that case their Lordships held that in view of the provisions of section 462 of the then Code of Civil Procedure (which corresponds to Order 32, rule 7 of the present Civil Procedure Code) the managing member who had been appointed a guardian in the suit had no

(1) 42 I.A. 132

authority to enter into any compromise or agreement purporting to bind the minor. This principle has been applied also to cases where the provisions of Order 32, rule 6, would apply and so it has been held in numerous cases in India that the Karta of a Hindu joint family though guardian in the suit cannot give a valid discharge in respect of a claim or a decree for "money or other movable property." (*Parmeshwari Singh* v. *Ranjit Singh* (1) and *Letchman Chetty* v. *Subbiah Chetty* (2)).

In the present case however there is no scope for the application of either the provisions of Order 32, rule 6 or Order 32, rule 7 of the Code of Civil Procedure. Neither is this a case of a receipt of any money or moveable properties; nor is there any question of entering into an agreement or compromise on behalf of the minor. For, clearly acceptance of delivery of possession of property in terms of the decree in a partition suit can by no stretch of imagination be considered entering into any "agreement or compromise."

We are therefore of the opinion that Jawala Prasad, the managing member of the family could have given a discharge of the liability under the partition decree by accepting delivery of possession on behalf of his minor sons without their consent and so time ran against them also under section 7 of the Limitation Act from the date of the decree. The High Court was therefore right in its conclusion that the application for execution was barred by limitation.

The appeal is accordingly dismissed with costs.

Appeal dismissed.

(1) A.I.R. 1939 Pat. 33. (2) (1924) I.L.R. 57 Mad. 920.

APPELLATE CRIMINAL

*Before Mr. Justice Mulla and Mr. Justice Nigam**

STATE

v.

1961
March, 16.

RAM BILAS AND OTHERS

Indian Penal Code, 1860, *s.* 396, *and Code of Criminal Procedure,* 1898, *s.* 207-*A*—*In a case under s.* 396 *Indian Penal Code only two witnesses examined in the committing magistrate's court—Identification of one of these was totally unreliable—Sessions Judge ignored the evidence of other identification witnesses produced for the first time at the trial—Whether ignoring of such evidence justified.*

Held, the legislature amended the Code of Criminal Procedure only to speed up the committing proceedings and not to lessen the degree of proof which was considered necessary earlier. The trial court was justified in feeling doubtful about the identification of those witnesses who were not examined in the Committing Magistrate's court.

Indian Penal Code, *s.* 412—Identification of property cannot be placed on the same footing as identification of a person. The owner is well acquainted with the stolen article and even though ostensibly there may be no distinctive mark, an owner can very frequently be trusted to pick up his own article from a large number of similar articles.

The rule laid down in *Lalla Singh's* case (1) is not applicable to the identification of property.

Asharfi v. State (2) not approved.

Criminal Appeal no. 203 of 1960 filed by the Government against the order of Prayag Narayan, Civil and Sessions Judge (Moveable) of Sitapur.

The facts appear in the judgment.

S. B. Mathur, for State.

K. A. Arabi, C. P. John and *D. P. Arena,* for accused nos. 2, 4, 7, 13 and 14.

Kesri Bir Prasad, for accuse nos. 1, 3, 6, 8, 10 and 11.

J. S. Trivedi, for accused nos. 9 and 12.

(1) Crl. Appeal no 291 of 1958, decided on 15th Dec., 1959.
(2) A.I.R. 1961 All. 133.
*Sitting at Lucknow.

C. P. John, for accused no. 5.

The Judgment of the Court was delivered by—

MULLA, J.—This is an appeal filed by the State in a dacoity case. The Additional Sessions Judge of Sitapur acquitted the fourteen accused respondents, who were prosecuted under section 396 Indian Penal Code, but this decision aggrieved the State and it has filed this appeal.

The main ground on which the trial Court acquitted the accused-respondents was that only two witnesses were examined before the committing Magistrate and the identification by one of these witnesses was totally unreliable. It ignored to take into consideration the identification by the other witnesses who were produced for the first time before the trial court in view of a Divisional Bench decision of this Court in *Lalla Singh v. The State* (1). The Divisional Bench consisted of Mr. JUSTICE JAMES and one of us and the decision was dictated by MR. JUSTICE JAMES. One of us who sat on that Bench concurred with that decision. It observed in that decision:

> "No witness of identification can be deemed reliable unless he is found to consistently identify an accused person in the jail and in the courts of the committing Magistrate and Sessions Judge, and day-to-day experience shows that not unoften, a witness identifies a person in the jail and in the Sessions Court, but fails to do so in the Magistrate's Court, with the result that his evdence is invariably rejected. No doubt the amended Code of Criminal Procedure does not compel the prosecution to examine every witness in Magistrate's Court nevertheless the prosecution take a big risk by withholding from committing Magistrate's court

(1) Crl. Appeal no. 291 of 1958, decided on 13th Dec., 1959

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witnesses whose testimony includes personal identification. Even though his identification of a given accused person may be correct in the jail and in the Sessions court, I would consider it trustworthy only if I find him identifying him in the Magistrate's court also. I am, therefore, not disposed to attaching any value . . . to the identification of a witness who had correctly identified the accused in jail and in Sessions, but who had not been produced before the committing Magistrate."

It seems that this view was accepted in several decisions and then later on a contrary view was expressed and what is extraordinary about it is that this contrary view was also expressed by the same Judge whose view has been cited above. It is all the more amazing that when the learned Judge gave a contradictory view, he did not refer to the earlier view expressed by him and did not indicate that for some reason the earlier view was not correct and he had changed his view. This view was expressed in *Asharfi* v. *The State* (1). The counsel for the accused in that case had contended that if an identifying witness is not produced in the Magistrate's court then the defence loses the reasonable possibility of contradicting the subsequent identification before the trial court by his failure to do so before the committing Magistrate. The learned Judges in *Asharfi's* case (1) considered this argument and observed (p. 167):

"The argument is plausible and merits consideration. Now, the accused has a right to use a witness's statement before the committing Magistrate for contradicting him, and that right cannot be abridged, provided the legislature itself does not decide otherwise. But what has the legislature

(1) A.I.R. 1961 All. 153.

done? By introducing section 207-A in the Code by Act no. XXVI of 1955 it has considerably altered the law relating to the procedure to be adopted in commitment proceedings instituted on a police report, and by virtue of clause (4) has given to the prosecution absolute discretion in the matter of production of eye-witnesses and indeed this Bench has held in *State* v. *Yasin* (1), that if in a particular case the prosecution do not choose to call a single eye-witness they cannot be compelled to do so, it is clear, therefore, that the legislature itself has conferred a power upon the prosecution which results in the curtailment of the right of the accused to utilize a witness's statement in the committing court for his own benefit. Since this is the outcome of a specific statutory provision, no grievance can be made of the fact that by the non-production of an identifying witness in the Magistrate's court the accused has been deprived of a possible chance of discrediting him in the event of his failure to identify him in that court—we are not aware of any principle of law by which the prosecution can be penalised for exercising a right conferred upon them by the Statute."

We have given due consideration to the view expressed above. With all respects to the learned Judges, we are unable to agree with it. The basic question to be considered in our opinion was whether it was within the province of the legislature to lay down rules for the Courts of law as to what evidence they should believe and what evidence they should not believe. They can do so only by amending the Indian Evidence Act and certain other relevant statutes. They can do so by modifying certain Articles of the Constitution, but so

(1) 1958 A L J 413.

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long as the Indian Evidence Act remains as it is, it is for the courts of law to determine when a fact can be held to be proved. Apart from this, we believe that the legislature amended the Code of Criminal Procedure only to speed up the committal proceedings and not to lessen the degree of proof which was considered necessary earlier. At any rate there were two contradictory views given by two Divisional Benches of the High Court and the same Judge had given both these views. We have already mentioned above that the first view was followed in several other cases both by Single Judges and by Divisional Benches.

We may now give a list of the cases which support the view expressed in *Lalla Singh's case* (1). To the best of our knowledge barring *Asharfi's case* (2) there is a complete uniformity in the observations made in the other cases and there are no less than thirteen such cases. These thirteen cases include four Divisional Bench cases and nine Single Judge cases, excluding *Lalla Singh's* case (1). The position, therefore, is that there are five Divisional Bench cases in support of one view and only *Asharfi's* case (2), represents the contradictory view. These Divisional Bench cases are.

The State v. *Jaggu* (3).
The State of U. P. v. *Shabbir* (4).
The State v. *Ram Anjor* (5)
Gayadin v. *The State* (6).

It was observed in *Gayadin's* case (6), when the matter came before the Hon'ble Judges, on a reference by a single Judge:

"In our judgment it is not necessary to refer any question of law in this case to a Full Bench because

(1) Crl. Appeal no 291 of 1956, decided on 15th Dec. 1959.
(2) A I R 1961 All 158
(3) Crl Appeal no 350 of 1960 decided on 27th Oct., 1960
(4) Crl Appeal no 511 of 1960 decided on 1st Feb., 1961
(5) Crl. Appeals no 594 and 595 of 1960, decided on 8th Feb., 1961
(6) Crl. Appeals no 391 & 534 of 1960, decided on 10th Feb., 1961

in our opinion no question of law arises. The controversy, if there is any in this Court, is not with regard to the right of the prosecution whether or not to examine witnesses of identification in the committing court but only with regard to the value that is to be attached to the evidence of witnesses of identification who have not been examined in the committing court. There can be no hard and fast rule in a matter like this and every case has got to be judged in the circumstances and on the facts of its own case. Whether or not a particular person should be believed because he has not been examined in the committing court, cannot be a question of law. Consequently, we do not think it necessary to refer either this case or any question arising in this case to a Full Bench. We direct that this appeal shall be heard on merits by a Division Bench of this Court."

This order was passed on the 3rd of February, 1961 and *Gayadin's* case was decided on the 10th of February, 1961, and it is one of the Divisional Bench cases referred to above. The learned Judges observed in that case:

"The prosecution certainly has a right to refuse to examine all the witnesses in the court of the committing Magistrate We must however emphasize that the evidence of identification has always been considered a weak kind of evidence. That is why the courts are very reluctant to convict only on one identification. In order to assure the court that this evidence is reliable, it is desirable that a witness should be repeatedly asked to identify the person he had seen at the time of the dacoity."

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We may now give a list of Single Judge cases which cover this point. There were Single Judge decisions before *Asharfi's* case and they were:

Rameshwar v. *The State* (1).

Mohammad Umar v. *The State* (2).

Bajnath v. *The State* (3).

After *Asharfi's* case other cases which covered this point are:

Jadunath Singh v. *The State* (4).

Maiku v. *The State* (5).

Ambar v. *State* (6).

Sheo Ratan v. *The State* (7).

Mohammad Husain v. *The State* (8).

Raj Narain v. *The State* (9).

It is not necessary to quote extracts from every one of these decisions, but we would like to cite a passage from *Maiku* v. *The State* (5), which runs as follows:

> "It would thus be seen that the weight of authorities is not in favour of the view expressed in *Asharfi's* case (10) but against it. But there is another approach to the question. The Legislature cannot take away the rights of the courts of law as to how they should interpret the words of the statute. So far the definition of the word 'proved" in the Indian Evidence Act has not been changed by the Legislature. The definition of 'proved' is—a fact is said to be proved when after considering the matters before it the Court either believes it to exist or

(1) Crl. Appeal no 386 of 1959, decided on 16th Dec. 1959.
(2) Crl. Appeal no 596 of 1959, decided on 16th March, 1960
(3) Crl. Appeal no 854 of 1959, decided on 9th Feb., 1960
(4) Crl. Appeal no 11 of 1960, decided on 18th August, 1960
(5) Crl. Appeal nos. 474 & 507 of 1960, decided on 29th Nov., 1960.
(6) Crl. Appeal no. 422 of 1960, decided on 19th Dec., 1960
(7) Crl. Appeal no 516 of 1960, decided on 18th Jan., 1961
(8) Crl. Appeal no 539 of 1960, decided on 19th Jan., 1961.
(9) Crl. Appeal no 422 of 1960, decided on 10th Feb., 1961.
(10) A I.R. 1961 All. 153

considers its existence so probable that a prudent man ought under the circumstances of the particular case to act upon the supposition that it exists'. The definition makes it clear that a prudent approach is to be made and this is entirely the province of law courts to determine what is a prudent approach and what is an imprudent approach. As an instance there is nothing in law that says that when an accused is put for identification he should be mixed up with so many undertrials in order to make the test acceptable. The High Court, however, stressing the rule of prudence and caution has observed "in several decisions that where there are only one or awo suspects, at least ten undertrials should be mixed with each suspect. Where this direction given by the High Court is not observed, the High Court has not accepted the results of identification. In other words, what should be the approach of prudence is not a question of statute but a question on which the High Court formulates its own approach and its own rules. Therefore, where the High Court does not accept the identification made by a witness at the trial court, unless that identification is also supplemented by an earlier identification in the Committing Magistrate's court, it is really not a question of interpreting the statute but observing a rule of caution. The terminology of the amended section 207-A, Criminal Procedure Code, is, therefore quite irrelevant in deciding this question and even if it is permissible under the terminology of that section the results would still be suspect under the rule of prudence and caution. In *Asharfi's* case, (1) with all respect to the learned Judges, only an attempt was made to interpret the words of section 207-A, Criminal Procedure Code, and what I have observed above was

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not considered. In my opinion section 207-A was introduced only to speed up and simplify the procedure and not to lessen the degree of proof, but the prosecuting agency misinterpreted this purpose and is abusing it by suppressing material evidence . . . It is, therefore, for the High Court to give directives of prudence and caution for the prosecuting agency cannot be permitted to interpret the provisions of section 207-A as an excuse for not presenting the evidence in such a manner that it may create confidence in the mind of a prudent man. I am, therefore, of the opinion that where the circumstances are such from which a reasonable inference can be drawn that a witness was suppressed because the prosecution did not want to subject him to be tested at that stage, the rule of prudence demands that the evidence of that witness should not be accepted."

In view of the extract cited above it is not necessary to deal with this matter any further. We agree with the view first expressed in *Lalla Singh's* case (1) and then followed by so many decisions. The trial court was, therefore, justified in feeling doubtful about the identification of those witnesses who were not examined in the committing Magistrate's Court. If these witnesses are ignored only two witnesses remain and both these witnesses are totally unreliable.

The trial court found Durjan to be unreliable because he committed too many mistakes, but it found that P.W. 2 Badlu was a good witness, but it would not be safe to base a conviction on the identification of a solitary witness. The performance of Durjan was that in the first parade he identified five persons correctly and made ten mistakes. In the second parade he identified two persons correctly and made seven mistakes. In the third parade he identified a suspect correctly and made no

(1) Cri. Appeal no. 291 of 58, decided on 15th Dec. 1959

mistake The total performance of this witness, therefore, is that he correctly identified eight suspects but in doing so he made no less than 17 mistakes. Obviously such a witness cannot be seriously considered and his identification is worthless The identification of the other witness P.W.-2 Badlu is also unreliable. In the three parades he identified no less than 14 persons correctly and this performance by itself makes the evidence of identification doubtful. A performance which is not within the orbit of normalcy, but amounts to an abnormal feat can seldom inspire confidence. Again and again we find that in dacoity cases the witnesses are endowed with extraordinary power of observation and memory and they perform wonders. Their performance always deviates from normalcy. We, therefore, find that none of these two witnesses is reliable and, therefore, there is no case made out against any of the 14 accused-respondents under section 396 Indian Penal Code

Three of the accused-respondents, namely Shanti, Mulhey and Ram Bilas were also charged under section 412 Indian Penal Code and it was alleged that stolen property was recovered from their possession. The trial court in assessing the evidence of recovery relied upon a Full Bench decision of the Allahabad High Court in *Deoman Upadhyaya* v. *The State* (1). Following the rule of law laid down in that decision, it held that section 27 of the Indian Evidence Act was *ultra vires* of the Constitution and so it did not accept the evidence of recovery in the case. That decision is no longer good law, for it has been set aside by the Supreme Court in *State of U. P.* v. *Deoman Upadhyaya* (2). We, therefore, find that the recovery of the stolen articles from the possession of these three accused-respondents cannot be ignored on the ground taken by the trial court.

(1) 1959 A.L.J. 651. (2) 1960 A.L.J. 735

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So far as the case of Shanti is concerned, the trial court has given good reasons for coming to the conclusion that the prosecution has failed to establish the recovery of the stolen article from his possession. Shanti had denied that any property was recovered from his possession and the evidence on that point is not only discrepant, but it appears to us that Ch. Ishrat Husain (P.W.-46), Station Officer, Talgaon, indulged in one of his tricks when he produced this property. Once the investigation becomes tainted, it is not possible to place reliance upon the evidence of recovery, unless it is beyond dispute The case of Mulhey is also similar. He had also denied the recovery of stolen article from his possession and we cannot place reliance on the testimony of the prosecution witnesses in this case who alleged that this property was recovered from Mulhey

But the case of Ram Bilas can be distinguished. Ram Bilas admits that the *orhni*, Ex. IV, was recovered from his possession. This *orhni* was described in the list of stolen property given at the time when Durjan lodged his report The trial court when it acquitted Ram Bilas observed:

> "One identification alone is not sufficient to fix the identity of the property beyond reasonable doubt. As far as the question of fixing the identity of the property from its description in the F. I. R. is concerned, the *orhni* has been described in the F. I. R. as 'Hari rangi hui safed butidar derh pat ki safed got lagi'. The *orhni*, Ex.-4, is of one and a half breadth (derh Pat) and had a white border all round. It has white flowers also but there are other colours also in the flowers including green and yellow, and the yellow colour is a little more prominent than the white. Regarding the base colour also, the learned Magistrate who conducted the identification proceedings, Sri N. M.

Majumdar (P.W.-28) has stated that it is blue, while the complainant Durjan has stated that it is green. I have carefully seen the *orhni*, and I consider that the colour is something like slate colour, and in the experience of this Court, this Court has found numerous persons calling this colour green. Coupled with the evidence of identification by three witnesses, I would have considered the ownership of this *orhni* proved beyond reasonable doubt, specially as the accused could not produce any evidence about his own ownership, but in view of the fact that the evidence of identification has been rejected I consider that the identity of the *orhni* is not established beyond reasonable doubt by its description in the F. I. R. alone."

We would at once express our disagreement with the last observation in the extract cited above. In our opinion the description given in the first information report tallies completely with the article recovered and this slight discrepancy about the colour being green, blue or slatish is of no consequence at all. It is one of those cases where the description given in the list of stolen property is by itself sufficient to bring conviction to one's mind that the article exhibited in the court is the same article. The identity of the article is established by this description alone. It is one of those cases in which even an identification is not needed to satisfy a court that the property before it was stolen property, unless it felt a doubt that the list of stolen property was suspicious and reliance cannot be placed upon it. Over and above this, there was the identification by P.W.-1 Durjan, which was more than enough to prove that this article belonged to Durjan and it was looted in this dacoity. But we have also failed to appreciate the approach made by the trial court in placing the identification of property on the same footing as the

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identification of a person. The trial court completely ignored that identification of person means recognizing the face of a stranger who was seen momentarily only at the time of the dacoity. The identification of property is really the recognition of property for the owner knows his own articles and when he sees them, he picks them out. He is well acquainted with all the peculiarities of that article and even though ostensibly there may be no distinctive mark, an owner can very frequently be trusted to pick out his own article from a large number of similar articles. There is some peculiarity in the article which is present in his sub-conscious mind and which he himself may not be able to describe. It was, therefore, idle to place the identification of property on the same footing as the personal identification of an accused person. Apart from this we find that even if this rule was to be applied in this case the description of the property together with the identification by Durjan was more than sufficient to prove that this *orhni* was stolen property. We, however, want to make it absolutely clear that the rule of law laid down in Lalla Singh's appeal and followed in the other cases is not applicable to the identification of property. We may mention that so far as identification of person is concerned, the courts have repeatedly held that at least five similar persons and occasionally a larger number of persons should be mixed before the identification is held to be reliable In the identification of property frequently only two or three similar articles are mixed and although it is desirable that a larger number of similar articles should be mixed, still the identification of property is not disbelieved if the witnesses are credible and they have been subjected to a fair test merely because the similar articles mixed were only two or three in number. This is only to illustrate that the identification of property stands on a different footing

than the identification of person. The trial court, therefore, misdirected itself when it followed the principle laid down in *Lalla Singh's* case (1) and applied it to the identification of property.

We, therefore, find that a case under section 412 Indian Penal Code is satisfactorily established against Ram Bilas accused-respondent

The result is that we uphold the order of acquittal passed by the trial court in favour of all the accused respondents under section 396 Indian Penal Code and we also maintain the order of acquittal passed by the trial court in favour of Shanti and Mulhey under section 412 Indian Penal Code. We however, find that a case under section 412 Indian Penal Code is made out against Ram Bilas, as the stolen property was recovered from him only about three days after the commission of the offence We, therefore, set aside the acquittal of Ram Bilas under section 412 Indian Penal Code and convict him under that section. We award him a sentence of five years' rigorous imprisonment under section 412 Indian Penal Code. All the accused respondents, except Puttu, Kallan and Maiku, are on bail. Kallan and Maiku, we are informed, are in jail in connection with some other offence. If this is true, they should not be released, but so far as this case is concerned, they are acquitted and they are entitled to be released, unless wanted in connection with some other case. Puttu should be released forthwith, unless wanted in some other case Ram Bilas should surrender forthwith to serve out the sentence imposed upon him today. The bail bonds of the other accused respondents are discharged.

No further orders are necessary on Criminal Miscellaneous Application no. 53 of 1961.

Appeal partly allowed

(1) Cri. Appeal no. 291 of 58, decided on 15th Dec., 1959

(FULL BENCH) APPELLATE CIVIL

Before the Hon'ble M. C. Desai, Chief Justice, Mr. Justice Mukerji and Mr. Justice Dwivedi

RAMGATI CHAUBEY (APPELLANT)

v.

1961
May, 17.

RAM ADHAR CHAUBEY (RESPONDENT)

Order of mutation court—*Under s. 35 of U. P. Land Revenue Act*, 1901—*On the compromise application of the parties, if embodies the whole petition of compromise.*

The questions that arose for determination were firstly whether in the instant case the order of mutation court embodied the petition of compromise effecting immoveable property worth more than Rs 100 which purports to regulate the future rights of the parties in that property, secondly, whether the petition of compromise having been embodied in the order, becomes admissible and thirdly whether the compromise evidenced by the order is conclusive and binding upon the parties.

The court held—

(i) that the word 'approved' written on the compromise application suggests that the Sub-Divisional Officer only granted the prayer expressly asked for in the application, the express prayer being that the names of the parties should be mutated over specified properties,

(ii) that the order should be deemed to refer to and embody only those provisions of the compromise which specified the properties, it cannot be made to refer to and embody those provisions of the compromise which declared the parties to be absolute owners not could it be assumed that the Sub-Divisional Officer who had no power to decide property rights, gratuitously incorporated them in his order,

(iii) that since the order is ambiguous it must be presumed that it directed what the Sub-Divisional Officer was asked to do and what he would lawfully do,

(iv) that the order of the mutation court did not embody that part of the compromise application which declared the parties to be absolute owners,

(v) that in view of the opinion on the first question the other questions become moot and it was not necessary to express opinion on them in this case.

Case-law discussed.

Second Appeal No. 1985 of 1954 from a decree of A. Pandey, Civil Judge of Deoria, dated the 23rd Oct., 1954.

The facts appear in the judgment.

Shambhu Prasad for the appellant.

V. P. Misra for the respondent.

The Judgment of the Court was delivered by:—

DWIVEDI, J.:—Gurtu, J. has referred to us the entire appeal with the following question for specific opinion:

> "Whether the order of the mutation court embodying a petition of compromise effecting immovable property worth more than Rs.100 which purports to regulate the future rights of the parties in that property is conclusive and binding upon them in respect of the property, even though it is not registered?"

It seems to me that the question assumes three things firstly, that in the instant case the order of the mutation court embodies the petition of compromise effecting immovable property worth more than Rs.100 which purports to regulate the future rights of the parties in that property; secondly, that the petition of compromise, having been embodied in the order, becomes admissible: and, thirdly, the compromise evidenced by the order is conclusive and binding upon the parties. I have, therefore, thought it proper to split up and reformulate the questions in my own language in this manner—

> 1. Whether the order of the mutation court embodies the petition of compromise filed by the parties before us in the court of the mutation Officer?
>
> 2. Whether the said compromise application declares rights to immovable property worth more than Rs.100, and is inadmissible in evidence for want of registration?

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3. If the answer to the first question is in the affirmative, whether the order of the mutation court is an order within the meaning of clause (vi) of sub-section (2) of section 17 of the Registration Act?

4. If the anwser to the third question is in the affirmative, whether the said order is admissible in evidence?

5. If the answer to the 4th question is in the affirmative, whether the compromise embodied in the order also becomes admissible in evidence?

6. Whether the compromise as evidenced by the order is binding and conclusive on the parties, even though it is not registered as required by law?

Facts no longer in dispute are these. In 1942, on the death of Mst. Gangi, the widow of the last male owner, Sheo Shankar Chaube the appellant a son of the daughter of his predeceased son, and the respondent, his nephew, claimed mutation of their names over the descendant's estate, which also comprised the suit property, but by an application, dated January 13, 1943, they requested the Sub-Divisional Officer, seized of the mutation case, to mutate their names over the property in accordance with the mutual settlement embodied in the application. 'Accordingly the appellants' name was mutated in respect of the suit property, and the respondent's name over the remainder, respondent, however, instituted a suit for recovery of the suit-property; the suit was decreed on appeal by the Civil Judge, who held that the application, dated January 13, 1943, which formed the basis of mutation, could not confer any right to suit property on the appellant and was inadmissible in evidence for want of registration.

I shall now narrate the material contents of the compromise application. It comprises three parts, the pre-

amble, the prayer and the terms of compromise, and the list of property. The preamble recites the claim of each party to the estate, and then declares that with a view to avoid ruinous litigation they have settled their differences and have arrived at a compromise through good counsel of their relations. There is then a prayer that the case should be decided and the names of the parties should be mutated in accordance with the compromise. Then there follow two clauses; (i) the name of the appellant should be mutated over the suit property. In the sentence following it is declared that over that property he would remain in possession as absolute owner and that the respondent would have no concern with it; (ii) the name of the respondent should be mutated over the remaining property. In the next sentence it is then declared that he would possess it as absolute owner, and that the appellant would have no concern with it, either in present or in future. The list of property dealt with is then mentioned in the application.

It is common ground that the property falling to the share of the appellant was worth more than Rs.100. It is not disputed on behalf of the appellant and I think rightly that the compromise application required registration under clause (*b*) of sub-section (1) of section 17 of the Registration Act, for it declared the parties to be absolute owners of their shares [See *Jagrani* v. *Bisheshar Dube* (1), *Ram Gopal* v. *Tulsi Ram* (2), *Mahadei Kuar* v. *Padarath Chaube* (3).] Not being registered it is ineffective and inadmissible in evidence.

The Sub-Divisional Officer, to whom the application was presented, passed a monomial order, 'approved', and thereafter the names of the parties were mutated in village records. The primary question is whether that order embodies the entire terms of the compromise application. An order which explicitly records the entire

(1) (1916) 14 A.L.J. 449. (2) (1928) 26 A.L.J. 952.
(3) 1937 A.L.J. 627.

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compromise application, poses no problem [*See Ranic Hemanta Kumari Debi* v. *Miĉnapur Zamindari Company Limited* (1),] but an ambiguous order needs judicial exposition as to what it does and what it omits to do [See *Pranal Anni* v. *Lakshmi Anni* (2).] In *Pranal Anni's* case the Privy Council said that the objection based on non-registration of the compromise did not 'apply to its stipulations and provisions in so far as these were incorporated with, and given effect to, by the order made upon it by the Subordinate Judge "On a close scrutiny of the compromise and the order it was, however, found that the order did not 'refer to or narrate' those terms of the compromise which related to property outside the suit. The Word 'approved' suggests that the Sub-Divisional Officer only granted the prayer expressly asked for in the compromise application, the express prayer being that the names of the parties should be mutated over specified properties. The order should, therefore, be deemed to refer to and embody only those provisions of the compromise which specified the properties; it cannot be made to refer to and embody those provisions of the compromise which declared the parties to be absolute owners. Neither was a request made to embody them in the order, nor can it be assumed that the Sub-Divisional Officer, who had no power to decide property rights, gratuitously incorporated them in his order. Since the order is ambiguous, it must be presumed that it directed what he was asked to do and what he could lawfully do. I am, therefore, of opinion that his order did not embody that part of the compromise application which declared the parties to be absolute owners.

I, therefore, answer the first question formulated by me in the negative.

In view of my opinion on the first and second questions the other questions become moot and it is not necessary to express opinion on them in this case.

(1) (1919) L.R. 46 I.A. 240. (2) (1899) I.L.R. 22 Mad. 508 P.C.

The appeal accordingly fails and I dismiss it with costs.

DESAI, J.:—I agree.

MULLA, J.:—I also agree.

Appeal dismissed

(FULL BENCH) CIVIL MISCELLANEOUS

Before Mr. Justice Bhargava, Mr. Justice Upadhya and Mr. Justice J. Sahai

RAJA JAGDAMBIKA PRATAP NARAIN SINGH
(PETITIONER)

v.

1961
Nov. 18

COMMISSIONER OF INCOME TAX, U. P., LUCKNOW AND OTHERS (RESPONDENTS)

Indian Income Tax Act, 1922, s. 6—*'Interest payble on zamindari compensation bonds by State Government if amounts to additional compensation not liable to tax or, is income from security or from 'other sources' liable to tax,—U. P. Zamindari Abolition and Land Reforms Act,* 1950 *ss. 27 to 54, 60, 61, 65, 68 and rules 62, 63, 65 and 66.*

The question that arose for determination in the writ petition was, whether the 'interest' payable on zamindari compensation bonds by the State Government is really not interest or income but is additional compensation not liable to income-tax, or, that it is income from securities or from 'other sources' and as such a revenue receipt which is liable to income-tax.

The court after considering in detail—

Held, (i) that the amount paid under the name of 'interest' cannot partake of the nature of compensation or damages but are in the nature of a return for the use that the Government makes of the money under the law deemed to be belonging to the intermediary.

(ii) that the sums which are paid as interest on the compensation bonds are not compensation

(iii) that the compensation bonds cannot be held to be Government security within the meaning of the Indian Securities Act.

(iv) that the compensation bonds which are in the form of promissory notes are fully covered by the definition given in sub-s. (2) of s. 2 of the Public Debt Act.

(v) that if there was some difficulty (though there seems to be none) in holding that the interest on compensation bonds issued to the petitioner is not interest on securities it would yet be taxable as it would be an income from 'other sources'.

(vi) that the sums of interest on the compensation bonds are liable to be charged to income-tax.

Case-law discussed.

Civil Miscellaneous Writ No. 2299 of 1958.

The facts appear in the judgment.

K. L. Misra and *V. P. Misra* for the petitioner.

Gopal Behari for the opposite-party No. 1 and Shambhu Prasad (Senior Standing Counsel) for the State.

The judgment of the Court was delivered by—

J. SAHAI, J.:—The petitioner Raja Jagdambika Pratap Narain Singh was the proprietor of what was known as the Ayodhya Raj before the abolition of Zamindari in this State. He held large properties in the districts of Faizabad, Gonda, Sultanpur and Bara Banki. As a consequence of the abolition of zamindari in this State his properties vested in the State of U. P., and the petitioner received by way of compensation for the acquisition of his rights in those properties compensation bonds during the period 1954 to 1958. The bonds are of a self-liquidating nature and the payment under them is spread over a period of forty years. They carry interest at 2½ per cent per annum on the principal amount, and are payable in forty equal instalments. The scheme of payment is that the interest for the whole year plus a part of the principal is paid every year. As the interest goes on decreasing due to the part payment of the principal every year, the amount of principal included in the instalment goes on increasing The petitioner, as required by the rules, presented his bonds for realization of instalments before the Treasury Officer, Faizabad. The latter under the directions of the income-tax authorities deducted large sums by way of income-tax from the amount of interest which was included in the instalment due to be paid to the petitioner. The petitioner objected to the realization of this amount, and made an application to the Income Tax Officer stating therein that the deduction made was illegal. The Income Tax Officer on 23rd of

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July, 1958, passed the following order on that application:

"Treasury Officers have general instructions on the subject direct from the Central Government and I regret I cannot issue a certificate as desired."

(Sd.) M. P. SRIVASTAVA,

I. T. O., Faizabad.

J. Sahai, J.

According to the petitioner the Income Tax Officer, Faizabad, had made an assessment order on the petitioner on 30th October, 1957. The petitioner filed a revision application under section 33-A (2) of the Income Tax Act before the Commissioner of Income Tax, U. P., agtinst the order of assessment *inter alia* on the ground that the income from interest on the zamindari bonds could not be assessed under the provisions of the Indian Income Tax Act. That application is admittedly still pending. The petitioner moved this Court under Article 226 of the Constitution of India on 18th of August, 1958. By that time a sum of Rs.36,916 had already been deducted and paid over to the income-tax authorities out of the equated instalments which had been paid to the petitioner under the compensation bonds issued to him. The petitioner has alleged that he apprehends that another sum of Rs.36,916 will be deducted from the next instalment of compensation which was due for payment on the 1st of July, 1958. He has consequently prayed for the issue of a writ, order or direction in the nature of mandamus commanding the Commissioner of Income Tax, U. P., Lucknow, the Income Tax Officer, Faizabad, and the Treasury Officer, Faizabad (respondents No. 1, 2 and 3 respectively), not to levy or realize any income-tax on or from any amount payable to the petitioner in respect of the compensation bonds issued to him. It is also prayed that a writ, order or direction in the nature of

mandamus be issued commanding the respondents to refund the sum of Rs.36,916 already deducted as income-tax from the petitioner's compensation. There is also a prayer for the issue of a writ of certiorari quashing the assessment order, dated 30th October, 1957. In the end there is the usual prayer for the issue of any other writ, order or direction as this Court may in the circumstances of the case deem fit and proper to issue.

On behalf of the respondents a counter-affidavit has been filed which is sworn by Sri Mukta Prasad Srivastava, Income Tax Officer, Faizabad, and a rejoinder affidavit has been filed on behalf of the petitioner sworn by Sri Lal Narayan Singh the Mukhtaram of the petitioner. It is really not necessary to narrate all the allegations made in the petition, the affidavit, the counter affidavit and the rejoinder affidavit because the question requiring decision is a short one and is primarily a question of law.

The petitioner's case is that, though called by the name of interest, the additional amount that is being paid to him over the compensation amount is really not interest or income but is additional compensation. The case of the respondents, on the other hand, is that it is income from securities or from 'other sources' and as such a revenue receipt which is liable to be taxed. In order to understand the exact nature of the payment over which there is controversy between the parties, it is necessary to consider some of the provisions of the U. P. Zamindari Abolition and Land Reforms Act (hereinafter referred to as the Act). Section 27 of the Act reads as follows:

> "Every intermediary whose rights, title or interest in any estate are acquired under the provisions of this Act shall be entitled to receive and be paid compensation as hereinafter provided."

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The substance of this section is that every landlord who has been called by the name of intermediary in the Act would be entitled to receive compensation for the acquisition of his estate. Section 28 of the Act clearly provides that compensation for acquisition of estates shall be due from the date of vesting subject to determination of the amount thereof, and sub-section (2) of that section provides that in case the amount is paid in cash interest at the rate of 2½ per cent per annum shall be paid from the date of vesting to the date of determination and in case of payment through bonds the same amount of interest shall be paid from the date of determination till the date of redemption of the bonds. The said section reads as follows:

> "28. (1) Compensation for acquisition of estates under this Act shall be due as from the date of vesting subject to determination of the amount thereof (2) There shall be paid by the State Government on the amount so determined interest at the rate of two and a half per centum per annum from the date of vesting to the date of—
>
> (i) in the case of the amount to be paid in cash, determination,
>
> (ii) in the case of amount to be given in bonds, the redemption of the bonds."

Section 29 of the Act provides that Government may direct payment of interim compensation, and section 30 is to the effect that if any interim compensation is paid under section 29 the same shall be deemed to be a part of the compensation payable under the Act and shall be deducted from and adjusted against it. The Act by means of several sections provides for the manner in which compensation shall be determined. It is not necessary for our purposes to consider all those sections

and we may notice only the most important ones. Sections 31 to 39 provide the manner in which the record shall be prepared and gross assets of a mahal determined. Section 40 provides that a draft compensation assessment roll shall be prepared, and section 41 requires that the same shall be signed by the Compensation Officer, section 42 provides the manner in which the gross assets of an intermediary are to be determined, and section 44 deals with the manner in which the net assets of an intermediary shall be fixed. Section 46 requires that the draft compensation assessment roll shall be published in the manner provided therein. Section 47 provides that a date shall be fixed for hearing of objection against the draft compensation roll, and section 48 provides for the manner in which the objection shall be heard. Sections 49, 50 and 51 deal with the order to be passed on the objections and with appeals that may be filed against the order before the District Judge and the High Court. Section 53 requires that the Compensation Officer shall deliver free of charge a copy of the compensation assessment roll to the intermediary concerned and shall cause a copy thereof to be fixed on the notice board of the office of the Assistant Collector in-charge of the Sub-Division. Section 54 provides that the compensation shall be eight times the net assets of an intermediary, and reads as follows:

> "54. The amount payable as compensation to an intermediary in respect of his interest in the mahals to which the compensation assessment roll relates shall, except where the interest of the intermediary therein is held by a thekedar, be eight times the net assets mentioned in the roll."

Section 60 provides that the amount determined under section 54 as compensation payable to an intermediary shall be declared by the Compensation Officer as the compensation payable to him in respect of his

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interest in the mahals to which the compensation assessment roll relates and the Compensation Officer shall record it in the roll in his own writing. Section 61 provides that except *bona fide* mistakes of a clerical or arithmetical nature the compensation assessment roll shall not be changed and shall become final. Section 65 of the Act reads as follows:

> "65 There shall be paid to every intermediary as compensation in respect of the acquisition of his rights, title and interest in every estate the amount declared in that behalf under section 60."

Section 68 provides that compensation may be paid either in cash or in bonds or partly in cash and partly in bonds. Under the provisions of section 64 of the Act rules have been framed by the State Government and rule 62 provides that compensation shall be paid in negotiable bonds. Rule 63 is to the effect that the bonds shall be in the form of promissory notes and shall be issued in denominations of Rs.50, Rs.100, Rs.200, Rs.500, Rs 1,000, Rs.5,000, and Rs.10,000 and that the same shall bear interest at 2½ per cent per annum on the principal calculated from the date of vesting and further that no interest shall be payable on any amount of principal beyond the date on which its payment fell due even though the sum is not realized by the holder of the bond. Rule 64 provides that the interest together with the principal of a bond shall be paid in equated annual instalments except for the last, and sub-rule (2) of that rule provides that the instalments shall be paid on the completion of each period of twelve calendar months from the date of vesting. Rule 65 provides that instalments due on a bond shall be payable on presentation from and after the due date of payment of instalment next after the delivery of the bond to the intermediary. There is a proviso to this rule which is to the effect that if one or more

instalments have already fallen due before the delivery of the bond those instalments shall be payable immediately after the delivery of the bond. Rule 66 is to the effect that the instalment shall be payable at the treasury or the sub-treasury in U. P., at which the bond is enfaced for the payment of the instalment.

The learned Advocate General who has appeared for the petitioner has submitted that the additional amounts which are paid over the principal amount of a bond cannot be considered to be revenue receipts and are not in the nature of interest though described by that name both in the Act as also in the rules. It has been contended that the scheme of the Act and the rules would show that compensation had sometimes been given another name, and our attention was invited to Chapter V of the Act which deals with rehabilitation grant. This additional sum which is made payable under the provisions occurring in Chapter V has been described by the name of rehabilitation grant. The learned Advocate General contends that even though those amounts have been described as rehabilitation grants, they are in fact nothing but compensation, and relies upon the Full Bench case of *Suryapalsingh* v. *U. P. Government* (1) where it has been held to be so. The submission is that it is the pith and substance of a payment which matters, and not the nomenclature, and even though the additional sums which are made payable on a bond may have been described as interest that description will not be conclusive of the matter and the court will have to carefully investigate their real nature in order to determine whether or not they can be treated to be interest on securities as is the case of the respondents. It is true that a Full Bench of this Court has in the case mentioned above held that rehabilitation grant is compensation. It is also true that not the name, but the pith and

(1) A.I.R. 1951 All. 674.

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substance of a payment can alone be conclusive about its essential nature. We are, therefore, called upon to decide as to whether the amounts paid as interest are additional compensation or are interest on securities or income from other sources as is claimed by the respondents.

Section 6 of the Indian Income Tax Act reads as follows :

> "Save as otherwise provided by this Act, the following heads of income, profits and gains shall be chargeable to income-tax in the manner hereinafter appearing, namely—
>
> (i) Salaries,
>
> (ii) Interest on securities,
>
> (iii) Income from property,
>
> (iv) Profits and gains of business, profession or vocation,
>
> (v) Income from other sources,
>
> (vi) Capital gains."

The petitioner admittedly has been a resident in the taxable territories throughout his life and was so even during the year of assessment giving rise to this writ petition. Section 4 of the Income Tax Act so far as relevant for our purposes provides that subject to the provisions of that Act the total income of any previous year of any person includes all income, profits and gains from whatever source derived which are received or which are deemed to have been received in taxable territories in such year by or on behalf of such person, or which, if such person is resident in the taxable territories during such year, accrue or arise or are deemed to accrue or arise to him in the taxable territories

during such year. Section 2 (6-C) of the Income Tax Act so far as relevant for our purposes reads as follows :

> " 'income' includes . . . . . "
>
> (iv) any sum deemed to be profits under the second proviso to clause (vii) of sub-section (2) of section 10, and any sum deemed to be "profits and gains under sub-section (2A) of that section or under sub-section (5) of section 12 ".

The effect of the above provisions of the Income Tax Act is that if any interest is earned on securities or any income is made from 'other sources' during the year of assessment the same shall be liable to be charged to income-tax. Thus the dispute between the parties is confined only to the question as to whether the additional sums paid to the petitioner over the compensation amount and named as interest are interest on securities, or income from other sources as alleged by the respondents, or are additional compensation as alleged by the petitioner. In other words, what are the realities of the case or, to put it differently, what is the natural quality of the additional payment ? Is it interest or is it compensation estimated and measured in terms of interest ? We may mention that there is authority in support of the view that even though damages for withholding its capital from the company may have been described as " interest " the same may be damages and not interest [see *In re National Bank of Wales Limited* (1)], Similarly compensation can be measured in terms of interest, and even though the word "interest" may have been used, it may in substance be compensation [see *Commissioners of Inland Revenue* v. *Ballantine* (2) and *Simpson* v. *Executors of Bonner Maurice* (3)]. In order to find out the real pith and substance of the additional payments we have to look into the scheme of the Act.

(1) L. R. (1899) 2 Ch. 629. (2) (1929) 14 Tax Cases 580.
(3) (1924) 8 Tax Cases 595.

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Under the provisions of section 28 of the Act compensation was due to the petitioner from the date of vesting. Inasmuch as compensation could not be paid before the same was determined and the determination of the amount would necessarily have taken some time, section 28 of the Act further provided that interest shall be paid on the amount of compensation determined from the date of vesting to the date of payment in cash if it was paid in cash and to the date of redemption of the bonds if paid in bonds. The legal position, therefore, is that the petitioner became entitled to compensation on the date of vesting, and inasmuch as he was not paid the amount of compensation interest is being paid to him over that amount till the redemption of the bonds. So far as the acquisition of his rights in the estate is concerned the compensation he is entitled to receive is the one provided for in section 65 of the Act, i.e., the amount declared as compensation under section 60 of the Act and no more. We have already mentioned the various sections in the Act relating to compensation in an earlier part of this judgment and suffice it to say that the amount that is declared under section 60 is the principal amount (of compensation) and does not include any interest Therefore under the law the amount that the petitioner received for the acquisition of his rights, title and interest in his estate is only the one which has been declared under section 60 of the Act, i.e. the principal amount. The additional sums that are being paid to him are not directly connected with the acquisition of his rights, title and interest in his estate but are a return for the use the Government is making of his money (compensation amount) till the date of redemption.

It is clear that the compensation contemplated by the Act is not equal to the value of the property, acquired. It is also true that so far as the Act is concerned a clear

departure has been made from the accepted principles of payment of compensation. In the general law relating to compensation for acquisition of property in this country as also in America the full value of the property has got to be paid by the State to the person whose property is acquired. The various provisions of the Act, however reveal that the compensation that is paid under it has got no relation to the actual value of the property. It is based on the arbitrary rule that the compensation will be the amount arrived at by multiplying the net assets of an estate by eight time. Other considerations are completely excluded. The various factors which are normally taken into consideration in determining compensation may include damages also for the period beginning with the deprivation of possession of the owner and ending with the payment of compensation on the ground that that amount is being paid as compensation or damages for loss of the right of the owner to retain possession. But because of the special nature of the provisions in the Act, neither this consideration nor the consideration that actual value of the property must be paid can govern the matter of compensation under the Act. Apart from it, the scheme of the Act also warrants the conclusion that the rights of an intermediary in an estate after the vesting of the same in the Government are converted into a right to receive money on the date of vesting or as from the date of vesting, but inasmuch as the payment of money is not immediately made, but is temporarily withheld from him and the amounts are paid gradually, 2½ per cent interest is paid. In other words the legal effect of the issuing of the bonds is that zamindari rights are converted into compensation and compensation into a promise to pay (through bonds). Thus the scheme of the Act reveals that the payment of interest is not related to the acquisition of the property but to the promise to pay or to the temporary use of the money by the

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Government. It has got to be conceded that the position under the Act is not a normal one. Ordinarily compensation has got to be paid in cash and cases are extremely rare where the Government after determining the compensation converts itself by law into the position of a debtor, and relegates the intermediary to that of a creditor and thus used the money which notionally . . . . and legally is that of the intermediary but over which he is not given actual possession or control. It is true that such a position is unique to the Act but the Legislature has created the position and the Act has been held to be valid. In that view of the matter it appears to us that the amounts paid under the name of "interest" cannot partake of the nature of compensation or damages but are in the nature of a return for the use that the Government makes of the money under the law deemed to be belonging to the intermediary.

It is obvious that in view of the peculiar provisions of the Act it would not be possible to get a direct authority on the point raised before us and neither any decided case nor any well-known principle, of the law of Eminent Domain or relating to the determination of compensation can help us. The case has got to be decided on the basis of its own provisions.

A large number of English as also some Indian cases have been cited before us. So far as the English cases are concerned we have to keep in mind the warning given by the Privy Council in the case of *Commissioner of Income-tax, Bengal* v. *Shaw Wallace & Company* (1) that it is the Indian Statute and not the English decisions which can help in interpreting the former. However, having looked into those decisions, it appears to us that there are three main groups in which these cases can be divided. The first group consists of cases arising out of a claim by or against a trustee who has been

(1) A.I.R. 1932 P.C. 158.

negligent in the discharge of his trust and has been ordered to repay the amount with interest or who, if found to have committed a fraudulent breach of trust, has been ordered to pay damages. In the former class of cases the portion of the amount received or paid as interest has been held to be assessable to income-tax but in cases where damages were awarded income-tax was held not to be exigible. The second group of cases deals with that class of cases where damages are awarded either on calculations based on interest or otherwise but where interest as such was neither payable under any law nor demandable by virtue of any contractual obligation incurred by the parties. In these cases income-tax is not payable on the amounts paid even though called by the name of interest. The third group consists of cases which deal with the receipt of damages or compensation in the course of business or trade carried on by a trader. Such amounts have been held to be liable to be assessed to income-tax. As we have already said above the provisions of our Act (Zamindari Abolition Act) are peculiar and it is not possible to find any close parallel in any of the decided cases.

Learned counsel for the petitioner has placed reliance upon the case of *Behari Lal Bhargava* v. *Commissioner of Income-tax, C. P. & U. P.* (1). In that case what happened was that two houses belonging to Ramji Das Bhargava, father of Behari Lal Bhargava, were acquired by the Improvement Trust under the Land Acquisition Act and possession was taken over the same on 11th of November, 1927. The amount awarded by the Land Acquisition Officer was Rs.13,225 which Ramji Das Bhargava did not accept as adequate, and referred his claim to the Tribunal who increased the amount of compensation to Rs.97,640. The Tribunal

(1) 9 I.T.R. 9.

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also directed the Improvement Trust under section 28 of the Land Acquisition Act to pay interest at 6 per cent per annum from the date of taking possession of the property to the date of payment of Rs.97,640. The Improvement Trust having failed in its appeal to the High Court paid to Behari Lal Bhargava and his brothers (Ramji Das Bhargava having died meanwhile) not only the sum of Rs.97,640 but also a further sum of Rs.49,660 as interest. The share of Behari Lal Bhargava in the interest amount was Rs.12,415 and the question that arose in this court was whether that sum could be treated as income and made assessable. The submission that was made on behalf of Behari Lal Bhargava was that the sum of Rs.12,415 was compensation on account of his having been deprived of his property from 11th of November, 1927, to 6th of April, 1931, without receiving its monetary value, and the granting of interest under section 28 of the Land Acquisition Act was merely a convenient way of assessing such compensation. This Court accepted that submission. The main ground on which the case of *Behari Lal Bhargava* (1) is, in our opinion, distinguishable is that whereas compensation to be awarded under the Land Acquisition Act is the natural compensation being equivalent to the market value of the rights and the property acquired and has to conform to all the principles relevant for determining the amount of compensation, the compensation under the Act is a fixed one and cannot exceed, for whatever cause, the amount arrived at by multiplying the net assets of an estate by 8 times. In other words, whereas it was possible for the learned Judges in *Behari Lal Bhargava's* case (1) to have taken into consideration a number of circumstances in order to determine the exact compensation, it is not possible to do so in the present case considering the express language of our own statute. The considerations which prevailed with the learned Judges of this

(1) 9 I.T.R. 9

Court in *Behari Lal Bhargava's* case (1) to conclude that the amount given as interest was not interest as such but compensation are, to quote their own words, as follows :

"But the assessee had lost both possession and title on the 11th November, 1927, and so it is difficult to see how this money can be treated as profits when the assessee neither owned nor possessed what was on this view of the matter the only possible source of such profits. Nor can it very well be said that the money in question represents the interest which the assessee might have received by investing the principal sum, and this for two reasons. In the first place the principal sum which was ultimately found due as at 11th November, 1927, as compensation for the acquisition was not determined and so did not exist until the 6th April, 1931, the date of the Tribunal's order ; and in the second place, as we have already said, the interest awarded is compensation for the loss of the late owner's right to retain the property. If the interest awarded under section 28 of the Land Acquisition Act is income, it must have a source It seems to us that there are only two possible sources, either the property or its equivalent in money, and as we have already said, we do not think that this interest can be said to have arisen from either of these. It is not the 'fruit of a tree'—to borrow the simile used in *Shaw Wallace's* case (1)—but was compensation or damages for loss of the right to retain possession ; and it seems to us that section 28 was designed as a convenient method of measuring such damages in terms of interest. Under section 28 the awarding of interest is not mandatory, but is discretionary with the court; and so the claimant is not entitled to it as of right under any rule of law."

(1) 9 I.T.R. 9 (2) A.I.R. 1932 P.C. 158.

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In our case the interest is receivable by an intermediary as of right under the statute. Apart from it, the source of the interest is the amount of compensation. It is, therefore, in the nature of a fruit from a tree, the interest being the fruit, and the compensation being the tree. In our case, unlike that of Behari Lal Bhargava where the right to receive compensation accrued only on its being tendered under section 31 of the Land Acquisition Act, the right to receive compensation to an intermediary accrued on the date of vesting. It is true that actually he did not receive compensation on that date but under the law he is entitled to receive it with effect from that date and by a legal fiction he will be deemed to have received compensation on that date, but inasmuch as he is not allowed to have dominion or control over the amount of compensation interest is paid to him. Lastly the consideration that the principal compensation amount (the value of the property) should be increased by an additional sum paid as damages to person for the loss of his right to retain the property during the period after acquisition and before determination and payment of compensation cannot be applied to our case considering the language of the Act. In our case whatever be the circumstances, whatever be the reason, the compensation cannot exceed the amount arrived at by multiplying the net assets by 8 times. We have already said above that the provisions of our Act are unique. It may also be said that from a particular point of view they may not be considered to be fair, but this Court is not the Judge either of the necessity of the legislation or about its fairness so long as it can withstand the onslaught on the constitutional competence of the U. P. Legislature to enact it. In the case of *Behari Lal Bhargava* (1) the amount called interest came into existence by virtue of the compensation award as amended by the Tribunal and could for that reason be treated as

(1) 9 ITR

a part of the compensation; in our case the identity of the compensation and the interest is throughout kept apart and the interest which is not provided for by the compensation roll never merges in the compensation amount. In the Land Acquisition Act there is no provision similar to section 28 of the Act. In a case under the Land Acquisition Act the right to receive compensation but accrues only after the compensation does not date back to the date of dispossession but accrues only after the compensation has been determined and the award made. Thus in those cases whatever amount is payable till the date of award, be it named as interest or compensation amount, may be considered as compensation. For the reasons mentioned above it appears to us that the case of *Behari Lal Bhargava* (1) is distinguishable. We may also state that the Madras High Court in the case of *Commissioner of Income-tax, Madras* v. *Narayanan Chettiar* (2) the Nagpur High Court in the case of *Gopaldas Mohta* v. *Commissioner of Income-tax* (3) and the Patna High Court in the case of *Commissioner of Income-tax* v. *Kameshwtr Singh* (4) did not accept the decision in *Behari Lal Bhargava's* case (1) as correct. In view of the fact that we consider that case to be distinguishable it is really not necessary for us to consider whether that case has been correctly decided. It may however be said that the learned Judges who decided it were not also very sure about their conclusions as is apparent from the following words in their judgment:

> "It was not without considerable doubt and hesitation that we have arrived at this decision, for there is much to be said on the other side; but upon the whole matter we think that this is the correct view to take and we also bear in mind that

(1) 9 I.T.R. 9
(2) 20 I.T.R. 510
(3) 11 I.T.R. 470
(4) 23 I.T.R. 212

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where the interpretation of a fiscal enactment is open to doubt, it should be construed favourably to the subject."

The next case on which reliance is placed is *Commissioner of Income-tax, Bihar and Orissa* v. *Kameshwar Singh of Darbhanga* (1). This case is cited in order to support the contention that even though bonds have been issued, until the last bond is redeemed and payments fully made, it cannot be said that the compensation has been paid to the petitioner by the delivery of the bonds or by the determination of the compensation amount and therefore the amounts paid as interest are compensation and not interest as such. That was a case of a promissory note and not of a negotiable bond and in that case there was no section similar to section 28 of the Act. That case, therefore, is clearly distinguishable as the following observations of the Privy Council would show :

> "Now here the first six items, amounting to Rs.20,74,973, may perhaps reasonably never be regarded as the equivalent of cash, but the seventh item of Rs.17,34,596, consisting of the debtor's own promissory notes, was clearly not an equivalent of cash. A debtor who gives his creditor a promissory note for the sum he owes can in no sense be said to pay his creditor: he merely gives him a document or voucher of debt possessing certain legal attributes. So far that as this item of Rs.17,34,596, is concerned the assessee did not receive payment of any taxable income from his debtor or indeed any payment at all."

In the case of bond which is negotiable the mere delivery of the bond amounts to payment.

It is next contended that it is not possible to hold that the compensation is paid by the mere delivery of the bonds because that would amount to requisitioning the amount of compensation which is not possible

(1) 1955 A.L.J. 547.

because money cannot be requisitioned. In this connection reliance has been placed upon certain passages from the book "Constitutional Limitation by Cooley" as also from the book "Eminent Domain by Nichols" which were considered by their Lordships of the Supreme Court in the case of *State of Bihar* v. *Kameshwar Singh* (1). Those passages only indicate that acquisition of money can only amount to compulsory loan and generally such compulsory loans are not resorted to by a State except in emergencies like war. The law contained in those passages relates to the general law as applied in America and other countries and has nothing to do with the interpretation of the provisions of our Act. Even those passages, clearly indicate that compulsory loans are levied or can be levied in cases of emergency. Therefore notions of compulsory loans are not unknown to the civilized world. In our Act in substance by issuing compensation bonds the State raises a compulsory loan and its validity has got to be decided on the basis of our own Constitution and not with reference to the statement of law contained in the book of either Cooley or Nichols. The Supreme Court in *Kameshwar Singh's* case (1) has already held that the payment of compensation by means of bonds is not unconstitutional.

For these reasons we are of the opinion that the sums which are paid as interest on the compensation bonds are not compensation. We may however state that we have arrived at this conclusion with a certain amount of reluctance. The compensation that was paid to the petitioner was far less than the value of his property. The payment of the compensation has also been spread over a period of 40 years and if out of the interest which is paid on the principal amount large sums are to be taken away by the income-tax authorities it must

(1) A.I.R. 1952 S.C. 252, 295.

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be adjudged to be a case of extreme hardship but we have to administer the law as it is and considerations of hardship cannot prevail over the express language of the statute.

The next question to consider is whether these amounts can be considered as interest on securities or income from other sources. We will first go into the question whether they can be treated as interest on Government securities. Section 2(*a*) of the Indian Securities Act 1920 (No. X of 1920) reads as follows :

> "In this Act, unless there is anything repugnant in the subject or context,—
>
> (*a*) 'Government security' means promissory notes (including treasury bills), stock-certificates, bearer bonds and all other securities issued by the Central Government at any time or by Government of any Part A State before the 1st November, 1956, or by a State Government on or after that date in respect of any loan contracted either before or after the passing of this Act, but does not include a currency note ; "

Thus in order to be a Government security, a promissory note, or a stock-certificate, or a bearer bond has got to be in respect of "any loan". In the present case no loan as such was raised by the Government, though in a sense it may be said that by issuing bonds Government has compulsorily taken the compensation amount on loan. However it is not in that sense that the word 'loan' has been used in the Indian Securities Act. Consequently in our judgment the compensation bonds cannot be held to be Government security within the meaning of the Indian Securities Act.

It may next be considered whether the compensation bonds can be considered to be a security within the

meaning of that word occurring in the Public Debt Act (No. 18 of 1944). Section 2(2) of that Act reads as follows :

"2. In this Act, unless there is anything repugnant in the subject or context,—

* * * *

(2) 'Government security' means—

(a) a security, created and issued by the Government for the purpose of raising a public loan, and having one of the following forms, namely :

(i) stock transferable by registration in the books of the Bank ; or

(ii) a promissory note payable to order;

or

(ii) a promissory not payable to order ;

or

(iv) a form prescribed in this behalf ;

(b) any other security created and issued by the Government in such form and for such of the purposes of this Act as may be prescribed."

In our opinion the present bonds which are in the form of promissory notes are fully covered by the definition given in sub-section (2) of section 2 of the Public Debt Act. It is not necessary to go into this question in great detail because the argument on behalf of the petitioner has proceeded on the assumption that the sums paid by way of interest on the compensation bonds if not held to be additional compensation would be liable to income-tax.

Even if there was some difficulty (though we do not see any) in holding that the interest on compensation

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bonds issued to the petitioner is not interest on securities it would yet be taxable as it would be an "income from some other source". For the reasons mentioned above it appears to us that the sums of interest on the compensation bonds are liable to be charged to income-tax.

A preliminary objection was taken by Mr. *Gopal Behari* on behalf of the Income-tax Department which was to the effect that a writ of *certiorari* can only be issued if the mistake of law is self-evident and no long drawn arguments are required to make it manifest. Reliance was placed upon the case of *Satyanarayan* v. *Mallikarjun* (1). Inasmuch as we have already heard the parties on the merits, it is not necessary to decide the preliminary objection.

For the reasons mentioned above we are of the opinion that the petition should be dismissed but the parties should bear their own costs, and we order accordingly.

Petition dismissed.

(1) A.I.R. 1960 S.C. 137.

SUPREME COURT

APPELLATE CIVIL

Before the Hon'ble Mr. Justice Kapur, the Hon'ble Mr. Justice Hidayatullah and the Hon'ble Mr. Justice Shah.

GOVERNMENT OF UTTAR PRADESH AND OTHERS (APPELLANTS)

1961
February 16

v.

RAJA MOHAMMAD AMIR AHMAD KHAN (RESPONDENT)

[ON APPEAL FROM THE HIGH COURT AT ALLAHABAD]

Stamp Duty—*Presentation of a document to Collector for determination of—Power of Collector to impound the document after determining duty chargeable—Indian Stamp Act,* 1899, *ss.* 31, 32 *and* 33.

Where an instrument, whether executed or not and whether previously stamped or not, is presented to the Collector under s. 31 of the Stamp Act, his power is limited to the determination of the duty chargeable on the same. The Collector becomes *functus officio* as soon as he decides that question and has, therefore, no power of impounding the instrument under s. 33 of that Act which is attracted on the production of a document as a piece of evidence or for being acted upon, registered or authenticated. It would be an extraordinary position if a person simply seeking the advice of the Collector on the stamp duty payable without desiring or proceeding any further in regard to that instrument should be subject to the liabilities involved in the use of unstamped or under-stamped instruments.

Cooke and Kelly in re (1), *obiter, Collector, Ahmednagar v. Rambhau Tukaram Nirhali* (2), *Paiku Keshinath v. Gaya* (3) and *Chunduri Panakalla Rao v. Penuganda Kumaraswami* (4) referred to.

Civil Appeal No. 369 of 1957, from the judgment and decree, dated the 27th January, 1956, of the Allahabad High Court (Lucknow Bench) at Lucknow, in Civil Miscellaneous Application No. 17 of 1954.

(1) (1932) I.L.R. 59 Cal. 1171.
(2) I.L.R. 1938 Nag. 950.
(3) A.I.R. 1950 Bom. 392.
(4) A.I.R. 1957 Mad. 763.

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The facts appear in the judgment.

C. B. Agarwala, Senior Advocate (*C. P. Lal*, Advocate with him) for the appellants.

V. D. Misra, Advocate, for the respondent.

The following Judgment of the Court was delivered by—

KAPUR, J.:—This is an appeal against the judgment and order of the High Court of Allahabad on a certificate granted by that court. The respondent filed a petition under Art. 226 of the Constitution praying that the imposition of stamp duty by the Collector of Sitapur, of Rs.85,595-7 and a penalty of Rs 5 was against law and could not be realised against him and prayed that the order be quashed. On September 12, 1948, the respondent executed a wakf by oral recitation of *Sigha* and then it was written on a stamped paper which was signed by the respondent and attested by witnesses. On September 15, 1948, it was presented to the Collector for his opinion under s. 31 as to the duty chargeable. As the Collector himself was in doubt, he referred the matter to the Board of Revenue which, after a fairly long time, held that the document was liable to duty in accordance with Art. 58 of the Stamp Act. On October 29, 1951, the Collector held that Rs. 85,598-7 were payable as stamp duty and ordered that it be deposited within fifteen days. Notice to this effect was served on the respondent on November 10, 1951. Thereupon the respondent filed a petition in the High Court under Art. 226 which was dismissed on November 3, 1952, on the ground that it was premature. On February 2, 1954, a further notice was served upon the respondent to deposit the amount of the stamp duty plus the penalty of Rs.5 within a month otherwise proceedings would be

taken against him under s. 48 of the Stamp Act. Thereafter on March 1, 1954, the respondent filed a petition under Art. 226 of the Constitution in the Allahabad High Court challenging the legality of the imposition of the stamp duty and the penalty and prayed for a writ of *certiorari*. A full bench of the High Court quashed the order of the Collector and the State of U. P. has come in appeal to this Court.

The decision of this appeal depends upon the interpretation of ss. 31, 32 and 33 of the Stamp Act. The relevant portion of s. 31 provides—

> Section 31(1)—"When any instrument, whether executed or not and whether previously stamped or not, is brought to the Collector and the person bringing it applies to have the opinion of that officer as to the duty (if any) with which it is chargeable, and pays a fee of such amount (not exceeding five rupees and not less than eight annas) as the Collector may in each case direct, the Collector shall determine the duty (if any) with which, in his judgment, the instrument is chargeable".

It is admitted that the document in dispute was submitted to the Collector for his opinion under s. 31 and the opinion of the Collector was sought as to what the duty should be. Under s. 32 of the Act when such an instrument is brought to the Collector under s. 31 and he determines that it was already fully stamped or he determines the duty which is payable on such a document and that duty is paid, the Collector shall certify by endorsement on the instrument presented that full duty with which it is chargeable has been paid and upon such endorsement being made, the instrument shall be deemed to be fully stamped or not chargeable to duty as the case may be. Under the proviso to s. 32, the Collector is not authorised to make the endorsement if

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an instrument is brought to him a month after the date of its execution. Then follows s. 33 which is as follows:

Section 33 "Every person having by law or consent of parties authority to receive evidence, and every person in charge of a public office, except an officer of police, before whom an instrument, chargeable, in his opinion, with duty, is produced or comes in the performance of his functions, shall, if it appears to him that such instrument is not duly stamped impound the same.

(2) For that purpose every such person shall examine every instrument so chargeable and so produced or coming before him in order to ascertain whether it is stamped with a stamp of the value and description required by the law in force in British India when such instrument was executed or first executed:

Provided that—

(a) nothing herein contained shall be deemed to require any Magistrate or Judge of a Criminal Court to examine or impound, if he does not think fit so to do, any instrument coming before him in the course of any proceeding other than a proceeding under Chapter XII or Chapter XXXVI of the Code of Criminal Procedure, 1898;

(b) in the case of a Judge of a High Court, the duty of examining and impounding any instrument under this section may be delegated to such officer as the Court appoints in this behalf.

(3) For the purposes of this section, in case of doubt,—

(a) the collecting Government may determine what offices shall be deemed to be public offices; and

(*b*) the collecting Government may determine who shall be deemed to be persons in-charge of public offices."

The decision of this appeal depends upon the interpretation to be put upon the words "before whom any instrument chargeable . . . . is produced or comes in the performance of his functions". Dealing with these words the High Court held—

> "With all respect, therefore, we agree that the learned Judges deciding *Chuni Lal Burman's* case took a correct view of the words 'is produced or comes in the performance of his functions' used in section 33 of the Act to mean 'the production of the instrument concerned in evidence or for the purpose of placing reliance upon it by one party or the other'."

The High Court was also of the opinion that the object of paying the whole stamp duty was to get the instrument admitted into evidence or its being acted upon or registered or authenticated as provided in ss. 32(3), 35, 38(1) and 48(1) of the Stamp Act.

Counsel for the State referred to the various sections of the Act; first to the definition section; section 2(11) which defines what is "duly stamped"; s. 2(14) which defines "instrument" and s. 2(12) which defines "executed". He then referred to s. 3 which lays down what "chargeable" means and then to s. 17 which provides that all instruments chargeable with duty and executed by any person in British India shall be stamped before or at the time of the execution. Certain other sections, i.e., ss. 35 and 38(1) were also referred to and so also ss. 40(1)(*a*), 41, 42 and 48 but in our opinion it is not necessary to refer to these sections. What has to be seen is what is the consequence of a person applying to a Collector for his determination as to the proper duty on an instrument. The submission on behalf of the

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State (appellant) was that if an instrument whether stamped or not is submitted for the opinion of the Collector before it is executed, i.e., it is signed, then the Collector is required to give his determination of the duty chargeable and return the document to the person seeking his opinion but if the document is scribed on a stamped paper or unstamped paper and is executed then different consequences follow. In the latter case it was submitted that under s. 33 the Collector is required to impound the document if he finds that it is not duly stamped. On the other hand it was submitted on behalf of the respondent that on his giving his opinion the Collector becomes *functus officio* and can take no action under s. 33. It is these two rival contentions of the parties that require to be decided in this case.

After an inordinately long delay, the Collector determined the amount of duty payable and impounded the document. Power to impound is given in s. 33 of the Act. Under that section any person who is a Judge or is in-charge of a public office before whom an instrument chargeable with duty is produced or comes in the performance of his functions is required to impound the instrument if it appears to him not to be duly stamped. The question is does this power of impounding arise in the present case? The instrument in dispute was not produced as a piece of evidence nor for its being acted upon, e.g., registration, nor for endorsement as under s. 32 of the Stamp Act but was merely brought before the Collector for seeking his advice as to what the proper duty would be. The words "every person . . . . before whom any instrument . . . . is produced or comes in the performance of his functions" refer firstly to production before judicial or other officers performing judicial functions as evidence of any fact to be proved and secondly refer to other officers who have to

perform any function in regard to those instruments when they come before them, e.g., registration. They do not extend to the determination of the question as to what the duty payable is. They do not cover the acts which fall within the scope of s. 31, because that section is complete by itself and it ends by saying that the Collector shall determine the duty with which, in his judgment, the instrument is chargeable, if it is chargeable at all. Section 31 does not postulate anything further to be done by the Collector. It was conceded that if the instrument is unexecuted, i.e., not signed and the opinion of the Collector is sought, he has to give his opinion and return it with his opinion to the person seeking his opinion. The language in regard to executed and unstamped documents is no different and the powers and duties of the Collector in regard to those instruments are the same, that is, when he is asked to give his opinion, he has to determine the duty with which, in his judgment, the instrument is chargeable and there his duties and powers in regard to that matter end. Then follows s. 32. Under that section the Collector has to certify by endorsement on the instrument brought to him under s. 31 that full duty has been paid, if the instrument is duly stamped, or it is unstamped and the duty is made up, or it is not chargeable to duty. Under that section the endorsement can be made only if the instrument is presented within a month of its execution. But what happens when the instrument has been executed more than a month before its being brought before the Collector? Section 31 places no limitation in regard to the time and there is no reason why any time limit should be imposed in regard to seeking of opinion as to the duty payable.

Chapter IV of the Act which deals with instruments not duly stamped and which contains ss. 33 to 48, provides for impounding of documents, how the impound-

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Kapur, J.

ed documents are to be dealt with, Collector's powers to stamp instruments impounded and how the duties and penalties are to be recovered. It would be an extraordinary position if a person seeking the advice of the Collector and not wanting to rely upon an instrument as evidence of any fact to be proved nor wanting to do any further act in regard to the instrument so as to effectuate its operation should also be liable to the penaltics which unstamped instruments used as above might involve. The scheme of the Act shows that where a person is simply seeking the opinion of the Collector as to the proper duty in regard to an instrument, he approaches him under s. 31. If it is properly stamped and the person executing the document wants to proceed with effectuating the document or using it for the purposes of evidence, he is to make up the duty and under s. 32 the Collector will then make an endorsement and the instrument will be treated as if it was duly stamped from the very beginning. But if he does not want to proceed any further than seeking the determination of the duty payable then no consequence will follow and an executed document is in the same position as an instrument which is unexecuted and unstamped and after the determination of the duty the Collector becomes *functus officio* and the provisions of s. 35 have no application. The provisions of that section are a subsequent stage when something more than mere asking of the opinion of the Collector is to be done.

Our attention was drawn to the observations of RANKIN, C.J., *in re Cooke and Kelly* (1) but those observations are *obiter* as the High Court held that the reference under s. 57 of the Stamp Act was incompetent. The doctrine of *functus officio* was applied in several cases: *Collector, Ahmednagar* v. *Rambhau Tukaram Nirhali* (2). In that case a certificate of sale had been

(1) (1932) I.L.R. 59 Cal. 1171. (2) A.I.R. 1930 Bom. 398.

signed but the certificate was not duly stamped which was pointed out when it was sent to the Sub-Registrar for registration. The Sub-Registrar informed the Judge about it and the Judge got back the certificate from the purchaser and thinking that he had power to impound the document and to impose a penalty asked for the opinion of the High Court and it was held that after he had signed it he was *functus officio* and could not act any further and could not impound it. The same principle was laid down in *Patku Kashinath* v. *Gaya* (1) and in *Chunduri Panakala Rao* v. *Penugonda Kumaraswami* (2) and in our opinion as soon as the Collector determined the duty he became *functus officio* and he could not impound the instrument under s. 33 and consequential proceedings could not, therefore, be taken.

The appeal is therefore dismissed with costs.

Appeal dismissed.

(1) I.L.R. 1948 Nag. 950. (2) A.I.R. 1937 Mad. 763.

CIVIL MISCELLANEOUS

Before Mr. Justice Gurtu and Mr. Justice Upadhya.

MESSRS. GAPPU MAL KANHAIYA LAL
(APPLICANTS)

1961
September
25

v.

COMMISSIONER OF INCOME-TAX (OPPOSITE-PARTY)

Income Tax—*Silver coins forming part of cash balance of assessee ceasing to be legal tender-coin by sale of whether taxable—Income Tax Act, 1922, s. 4(3) (vii).*

Where silver coins included in the cash balance of the assessee carrying on money lending business cease to be legal tender they cannot thereafter be said to form part of the stock-in-trade of the money lending business. The profit made by the sale of silver coins at a price higher than their denominated value cannot, therefore, be said to be appreciation in stock-in-trade. In the absence of any finding or material on record to establish that the assessee had been accumulating those silver coins from year to year with the effect of making profit, the gain in question is one of a casual and non-recurring nature and is, as such, not liable to income-tax.

Miscellaneous Income-tax Case No. 887 of 1952.

The facts appear in the judgment.

R. L. Gulati, for the applicant.

Gopal Behari, counsel for the opposite-party.

The Judgment of the Court was delivered by—

UPADHYA, J.:—The questions referred by the Income-tax Appellate Tribunal are:

(1) Whether on the facts and in the circumstances of this case the amount of Rs.3,600 gained by the assessee by the sale of silver coins is a casual gain within the meaning of section 4(3)(vii) of the Indian Income-tax Act or is income liable to tax?

(2) Whether the Indian Income-tax Ordinance No 28 of 1950 is *ultra vires*?

Learned counsel for the assessee stated that he did not want that question no. 2 which had been referred at the assessee's instance should be answered. We therefore do not answer that question.

The reference relates to income-tax assessment for the year 1947-48 and the Excess Profits Tax assessment for the relevant chargeable accounting period from the 18th May, 1945 to 31st March, 1946.

The Income-tax Officer in his income-tax assessment order which is made a part of the statement of the case has stated that the set of accounts in which this transaction was found was kept in the name of Gappumal Kanhaiyalal, and was in the Head Office set of the assessee. In this account along with the other assets were entered silver coins and the Income-tax Officer has mentioned "that the assessee has old coins of silver out of which coins worth Rs.27,600 were sold away while worth Rs.4,100 remained in closing stock." The Income-tax Officer appears to have noticed that the assessee encashed 27 high denomination notes of Rs.1,000 each on the coming into force of the High Denomination Notes Demonetization Ordinance. On enquiry the assessee explained that he had received these notes in the sale price of the silver coins mentioned above. The accounts of the purchaser Sarraf were produced and the explanation was accepted. The Income-tax Officer found that the amount received included a sum of Rs.3,600 in excess of the face value of the silver rupees sold by the assessee. This sum he treated as profits and included it in the total income for the purposes of income-tax as well as the Excess Profits Tax assessment.

On appeal the Appellate Assistant Commissioner took the view that the silver rupees were allowed to remain with a view to make profits on their sale and the sum of Rs.3,600 in question was nothing but profit from an adventure in the nature of trade and was not casual within the meaning of s. 4(3)(vii) of the Act.

On further appeal the Income-tax Appellate Tribunal found that during the accounting year the assessee had in his possession nearly 40,600 silver rupees and it appeared that the silver coins formed part of the cash

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MESSRS. GAFFC MAL KANHAIYA LAL v. COMMISSIONER OF INCOME-TAX

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balance of the assessee. As the assessee did money lending business the cash balance held by him was a stock-in-trade and any 'appreciation of that cash is an appreciation of that stock-in-trade. The Income-tax Appellate Tribunal therefore held that the 'profit out of this' appreciation 'is liable to be taxed'.

While stating the facts of the case the Income-tax Appellate Tribunal has appended its own appellate order, out of which the questions arose, and the orders of the Income-tax Officer and the Appellate Assistant Commissioner, and observed that these orders would form part of the case. We have therefore been taken through these orders of the learned counsel for the parties.

When the taxability of the sum of Rs 3,600 was disputed before the Appellate Tribunal it does not appear to have approved of the ground on which the Appellate Assistant Commissioner had upheld the inclusion of that amount in the total income of the assessee. While the Income-tax Officer treated it as profits and the Appellate Assistant Commissioner held that it was gain from an adventure in the nature of trade the Appellate Tribunal found that it was an appreciation of the cash balance of the assessee and as the assessee was a money lender the cash balance was his stock-in-trade and because the amount was an appreciation of the stock-in-trade it was a gain liable to tax, as gains made in the money lending business. We have therefore only to examine whether the amount is taxable on the ground stated by the Income-tax Appellate Tribunal or whether it is not liable to tax because of the provisions of section 4(3) (vii) of the Act.

The Income-tax Appellate Tribunal has stated that the assessee had a Ghar Khata or home chest account in which large amount of cash is usually maintained. In the year 1935 the balance in this account amounted to Rs.91,000. The rupees which were sold and formed part of the cash

balance were held by the assessee year after year. When the silver rupees ceased to be legal tender the assessee did not take steps to have them exchanged for current account and these rupees remained with him, like other assets held by his family. The other assets in the Ghar Khata were shares and securities and house properties etc. held by him. The Appellate Tribunal has also stated that the assessee used to withdraw amounts from the balance held in the Ghar Khata as necessity arose for investment in his money lending business. From these facts it would appear that the large amount of cash held in the Home Chest did not form part of the cash balance of the money lending business and that after the silver coins ceased to be legal tender they ceased to be parts of the cash balance of the assessee and remained with him only like other assets. The statement of the facts does not say as to when these coins ceased to be legal tender. But learned counsel are agreed that they ceased to be legal tender several years prior to the relevant accounting period.

It is evident therefore that these silver coins which were sold by the assessee did not form part of the cash balance of the money lending business and it could not be said that they formed part of the stock-in-trade of the money lending business. Besides the Tribunal appears to have overlooked the fact that after these coins had ceased to be legal tender they could not possibly form part of the cash balance of the assessee because the cash balance could consist only of money which was legal tender. The view taken by the Tribunal therefore that the sum of Rs.9,600 was an appreciation of the assessee's stock-in-trade is incorrect. The silver coins were held by the assessee like other assets of the family. If the value of the house property held by the assessee appreciated it could not be contended that the increase in value amounted to an appreciation of stock-in-trade. Similarly if the silver coins which had remained in his

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possession were subsequently found saleable at a higher price it could not be said that the increased value received was due to any appreciation of the stock in trade. The silver coins were never the subject matter of any trade at all.

We are, therefore, of opinion that the sum of Rs.3,600 is not profit due to appreciation of the assessee's stock in trade in money lending business.

Section 4(3)(vii) reads as follows:

> "Any receipts not being capital gains chargeable according to the provisions of section 12-B and not being receipts arising from business or the exercise of a profession, vocation or occupation which are of a casual and non-recurring nature or are not by way of addition to the remuneration of an employee."

This clause embodies such classes of income, profits or gains as according to section 4(3) are not to be included in the total income of the person receiving them.

It is contended on behalf of the assessee that this gain was of a casual and non-recurring nature. Silver coins ceased to be legal tender on a particular date. Thereafter the value of the coins depended on their silver content and the price of silver prevailing in the market. If the price of silver had gone down the silver coins would have been worth less than their face value. The fact that they ceased to be legal tender could occur only once and any gain made by the sale of old silver coins could be only non-recurring in character. It is also casual because it could not be expected with any measure of certainty at the time when these coins were replaced by other coins and ceased to be legal tender. The gain, therefore, was also casual. The appellate Assistant Commissioner has mentioned in support of his opinion that the gain was from an adventure in the nature

of trade that the assessee had been accumulating silver coins from year to year with the object of profit making.

Learned counsel for the department has not been able to point out any material on the record which would warrant such a finding. From the mere fact that the assessee did not get these silver coins exchanged for other coins which were introduced by the government as legal tender no inference can be drawn about the object with which he omitted to get these coins changed. Keeping of large amount of cash and other assets was a normal phase of the assessee's manner of doing things and in the absence of any evidence and particularly, when the assessee was not called upon to show cause why such an inference may not be drawn against him, it would not be fair or just to infer from the fact that he allowed silver coins to lie in his possession, that he intended to make profits. But the reason given by the Appellate Assistant Commissioner is not strictly relevant, for the Appellate Tribunal has not upheld the taxability of the amount on that ground at all. The Tribunal's finding is based on the view that the silver coins formed part of the money lending business of the assessee, and as such were part of the stock in trade whose appreciation was liable to tax.

We have examined the Appellate Assistant Commissioner's view only to consider whether the gain may be said to be of a casual nature.

Having regard to the facts and circumstances of the case, mentioned above, we are of the view that the gain was of a casual and non-recurring nature and was not income liable to tax. We answer the first question accordingly.

The assessee will have his costs which is assessed at Rs.200. Fee of learned counsel for the Income-tax Department is fixed at the same amount.

Questions answered accordingly.

APPELLATE CIVIL

*Before Mr. Justice V. D. Bhargava and Mr. Justice Misra**

1961
February 28

BABOO NANDAN (PLAINTIFF)

v.

UNION OF INDIA (DEFENDANT)

Constitution of India, *Art. 311, Applicability of, to persons "connected with defence"—Wrongful dismissal—Acceptance of guilt—Sufficient opportunity.*

"A member of a defence service" or "a person holding any post connected with defence" have been omitted and the omission appears to be intentional because the constitution makers wanted to make the dismissal and removal of these servants non-justiciable. As the plaintiff was an employee "connected with defence", therefore Art. 311 will not apply.

After pleading guilty there was no question of giving him any opportunity to enquire into whether he had committed the theft or not.

There is a categorical finding of fact based on evidence that the plaintiff did refuse to accept the second show cause notice. If that was so, it cannot be said that the employers had not attempted to give him an opportunity.

The concurrent finding of fact about sufficient opportunity having been given is binding.

Second Appeal No. 281 of 1955 against the decree of D. S. MATHUR, I.C.S., District Judge of Lucknow (as he then was) dated 30th May, 1951.

The facts appear in the judgment.

H. D. Srivastava and *Umesh Chandra* for the appellant.

Junior Standing Counsel for the respondent.

The judgment of the Court was delivered by—

V. D. BHARGAVA, J.:—This is a second appeal which has been referred to a Divisional Bench by a learned single Judge of this Court, as, in his opinion, there was an important question of law involved in the matter about limitation.

The plaintiff Babu Nandan was employed as a labourer in the Military Department of the Government

*Sitting at Lucknow.

of India. He had been removed from the service on the 6th December, 1950. He brought a suit in the Court of the Munsif in the year 1952. He was a regular labourer getting Rs.75 per month in the Armed Forces, Medical Stores Depot, Lucknow, and had been working for about six years. On the 5th December, 1950, while he was engaged in stacking cotton wool bales in the depot, he was found to have wrapped a piece of lint over his head. According to the plaintiff, this piece of lint was unserviceable and he had wrapped his head with it as a protection from dust. On the other hand, the case of the Military Department was that it was cut from the original new packet of lint and the action of the plaintiff amounted to a direct misuse of the State property and wilful dishonesty.

A charge-sheet Ex. A-2(1A) was framed against the plaintiff. The plaintiff pleaded guilty and in his own words he said—

"Being my first offence, I beg to be excused."

The case of the plaintiff in the court was that he had never made that statement and a thumb-impression had been obtained under threat without reading out the writing to him and, therefore, no opportunity was given to him to show cause, as required under Article 311(2) of the Constitution. After the admission of the guilt there was another notice Ex. A-1 to show cause why the punishment of removal from service be not awarded to the plaintiff. The plaintiff refused to accept this notice and, thereafter, the plaintiff was removed from service. The complaint of the plaintiff was that he had not been given sufficient opportunity to show cause.

The defence was that Article 311 of the Constitution did not apply to the persons who were employed in the Defence Services or were "connected with defence". It was further contended that sufficient opportunity had been given and since the guilt had been accepted by

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the plaintiff, therefore, there was no occasion for giving any opportunity for leading evidence.

The trial court framed the following four issues:

(1) Was the plaintiff wrongfully dismissed, as alleged?

(2) Is the notice Ex. 3 illegal, as alleged?

(3) To what, relief, if any, is the plaintiff entitled?

(4) Is the suit non-maintainable in view of the proviso to section 42 of the Specific Relief Act?

Both the courts below dismissed the plaintiff's suit on the findings that his dismissal was not wrongful and he had been given sufficient opportunity to show cause. The lower appellate court while discussing the matter also came to the conclusion that Article 311 does not apply in the case of the plaintiff and even if there was no sufficient opportunity given to the plaintiff, the case would not be hit by Article 311(2) of the Constitution, as he belonged to the Defence Services.

When an appeal was filed in this Court, it was first heard by a learned single Judge and an entirely new question was raised on behalf of the respondent and that was that the suit on the admitted facts of the plaint was barred by limitation and it was contended that Article 14 of the Limitation Act applied which prescribed one year period of limitation and since the dismissal was on the 6th December, 1950, the suit in 1952 was barred.

On behalf of the appellant, it was contended that Article 120 of the Limitation Act applied and the suit was within time and reliance was placed on a decision of this Court in *Jagdish Prasad Mathur* v. *U. P. Government* (1). The learned counsel for the appellant has argued three points before us:

(1) That there has been an infringement of Article 311(2) of the Constitution.

(1) A.I.R. 1956 All. 114.

(2) That Article 311 of the Constitution applies in the present case and the decision of the courts below is erroneous.

(3) That the suit was within limitation.

We do not wish to discuss the second and third points at length, because in our view the concurrent finding of fact arrived at by the courts below about sufficient opportunity having been given to the appellant is binding on us and if there had been a sufficient opportunity given to the plaintiff appellant, the question whether the suit is within limitation or not or whether Article 311(2) of the Constitution applies or not becomes immaterial. From the enumeration of facts which we have given above, it is quite clear that he was given a charge-sheet to which he pleaded guilty. After pleading guilty there was no question of giving him any opportunity to enquire into whether he had committed the theft or not. The second show cause notice was being served on him which he deliberately refused to accept. There is a categorical finding of fact based on evidence that he did refuse to accept this notice. If that was so, the plaintiff is to blame himself for having not availed the opportunity and it cannot be said that the employers had not attempted to give him an opportunity.

There cannot be any doubt that he was employed in the Armed Forces. He was paid from the budget of the Defence expenditure and under the circumstances he would be deemed to be a member of the Defence Service or in any event he held a post "connected with defence". If we compare the language of Articles 310 and 311, it would be quite clear that the Constitution makers did want to make a distinction between different kinds of services. In Article 310 they speak of the following four kinds of services:

(1) A member of a defence service.

(2) A civil servant of the Union.

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(3) A servant of an All-India Service.

(4) A servant connected with Defence or any civil post under the Union.

These are all liable to be dismissed at the pleasure of the President. In Article 311, "a member of a civil service of the Union or an All-India service or a civil service of a State" has been mentioned to whom the Article will apply. "A member of a defence service" or "a person holding any post connected with defence," have been omitted and the omission appears to be intentional because they wanted to make the dismissal and removal of these servants *non-justiciable*, otherwise, there seems to be no reason why the words "connected with defence" have not been mentioned in Article 311. As the plaintiff was an employee "connected with defence", therefore Article 311 will not apply in this case.

We would prefer not to decide the question of Imitation at this stage because on these two issues the plaintiff has no case and the suit has rightly been dismissed by the two courts below.

The appeal, therefore, fails and is dismissed with costs.

Appeal dismissed.

APPELLATE CRIMINAL

*Before Mr. Justice Nigam and Mr. Justice Misra**

THE MUNICIPAL BOARD, BARA BANKI

v.

FAKHRUL HASAN

1961
October 23

Prevention of Food Adulteration Act, 1954, *s 7(i), read with s. 16(1) (a)—S. 19(1), vendor's ignorance no defence in prosecution—Word 'sale' defined.*

The provision [S. 16(1) (a)] as it stands is an easily understandable provision of law. The fundamental rules of interpretation that the Court will neither add any word to, nor substract anything from the provision unless it is necessary to do so. So there is no reason for adding any words to the enactment as it stands. Therefore the section as it stands clearly punishes any person who sells an adulterated article. It does not say that the person must make a sale for or on his own behalf. It merely provides that any person who sells an adulterated article may be punished and there is no reason for making any distinction between a master and a servant if he actually makes a sale.

Criminal Appeal No. 226 of 1960 against the judgment passed by Sri S. C. MISRA, II Temporary Civil and Sessions Judge, Bara Banki, dated February 20, 1960.

The facts appear in the judgment

M. L. Trivedi and *Nageshwar Dutta* for the appellants.

Shyam Lal Misra for opposite party.

The judgment of the Court was delivered by—

NIGAM, J:—This is an appeal under section 417 (3) of the Code of Criminal Procedure preferred by the Municipal Board, Bara Banki, against Fakhrul Hasan, who was originally prosecuted for an offence under section 7 (i), read with section 16 (1) (a) of the Prevention of Food Adulteration Act (No. XXXVII of 1954).

*Sitting at Lucknow.

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Nigam, J.

The facts in brief are that a sample of milk being sold by the respondent at Meena Hotel, Bara Banki, was taken by the Food Inspector, Dhanraj Bali, on the 15th April, 1959. The Public Analyst reported that the sample was deficient in fat contents, the deficiency being 35 per cent and that it contained 40 per cent of added water. A complaint was preferred by the Executive Officer of the Municipal Board and a conviction was recorded by the Sub-Divisional Magistrate, Nawabganj, who heard the case. The learned Sub-Divisional Magistrate imposed a fine of Rs.500 on Fakhrul Hasan with two months' rigorous imprisonment in default. Against his conviction and fine, Fakhrul Hasan appealed to the Sessions Judge of Bara Banki. The appeal came up for hearing before the learned Second Temporary Civil and Sessions Judge, Bara Banki, and was allowed by judgment, dated the 20th February, 1960. It is against that order of acquittal that this appeal is directed. We have heard the learned counsel for the appellant and the learned counsel for the respondent.

It is not necessary for us to enter into the facts of the case. Both the courts below have recorded a finding of fact that it was the respondent who was in fact exposing the adulterated milk for sale and that the sample of the adulterated milk was taken from him. The suggestion by the defence as regards another sample having been taken from another person was also rejected by both the courts below. The learned counsel appearing for the respondent has also not questioned any of these findings of fact.

The ground on which the learned Additional Sessions Judge accepted the appeal was that Fakhrul Hasan was not exposing or offering the milk for sale himself but was selling it on behalf of the proprietor of Meena Hotel, whose name has not come on the record. In

coming to that decision, the learned Additional Sessions Judge referred to a decision of the Kerala High Court in *State* v. *Kunchu* (1). The learned Additional Sessions Judge was under the impression that this was a Full Bench case of that High Court We, however, find that the decision was given by a Division Bench of the Kerala High Court. We also find that though the judgment was given on the 20th February, 1960, and the appeal was heard on the 18th February, 1960, the learned Additional Sessions Judge did not refer to a Division Bench decision of this Court in *Municipal Board, Lucknow* v. *Shyam Behari* (2) which was published in February part of the All India Reporter and the issue of the Allahabad Law Journal, dated 5th February, 1960. The Division Bench of this Court after referring to the provisions of section 7 stated—

> "The above provision also makes it quite clear that the person who can be punished for committing the offence is not only the person who actually sells the adulterated food, but also the person on whose behalf the adulterated food is sold." That was a case against the proprietor and thus the question directly before that Bench was whether the proprietor was liable or not. The remark quoted above may, therefore, be considered to be obiter but even if this was an obiter by a Division Bench of this Court it was fully binding on the learned Additional Sessions Judge. He should, therefore, not have relied on the decision of the Kerala High Court.

We have, however, considered the matter on merits and we must, with the greatest respect, record our inability to agree with the views of their Lordships of

(1) A.I.R. 1960 Kerala 13. (2) A.I.R. 1960 All. 117.

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the Kerala High Court. We proceed to give our reasons. The first reason is that in our view the provisions of section 19 of the Prevention of Food Adulteration Act, *mens rea* is not a necessary ingredient in so far as this offence is concerned. Section 19 clearly specifies the defences which may or may not be allowed in a case under this Act and reads—

> "19 (1) It shall be no defence in a prosecution for an offence pertaining to the sale of any adulterated or misbranded article of food to allege merely that the vendor was ignorant of the nature, substance or quality of the food sold by him . . . . . ."

It is thus clear that ignorance on the part of the vendor is no valid defence in a prosecution under this Act. Thus knowledge, much less intention, is not a necessary ingredient of the offence.

The second reason has reference to the definition of the word "sale" given in section 2 (xiii) of this Act. The definition reads—

> "Sale" with the grammatical variations and cognate expressions, means the sale of any article of food . . . . . for human consumption or use, or for analysis, and includes. . . . the exposing for sale or having in possession for sale of any such article, and includes also an attempt to sell any such article'.

In our opinion the definition of "sale" is wide enough to cover the case of a servant having in his possession article for sale and also exposure of the article for sale by a servant on behalf of his master.

We have made reference to this definition, as it will help the decision on the point as to whether a servant is liable under section 16(1) (*a*) of this Act or not. We,

therefore, turn to the provisions of section 16. Section 16 reads:

> "16 (1) If any person—
>
> (a) whether by himself or by any person on his behalf. . . . . sells or distributes, any article of food in contravention of any of the provisions of this Act or of any rule made thereunder".

It is not necessary for us to state that it is one of the fundamental rules of interpretation that the court will neither add any word to, nor substract anything from, the provision unless it is necessary to do so. The provision, as it stands, is an easily understandable provision of law. We do not see any reason for adding any words to the enactment as it stands. It is also clear to us that the section as it stands clearly punishes any person who sells an adulterated article. It does not say that the person must make a sale for or on his own behalf. It merely provides that any person who sells an adulterated article may be punished and we do not see any reason for making any distinction between a master and a servant if he actually makes a sale.

We may further add that the learned counsel for the respondent has not urged this point at all before us. It was conceded by him that a servant was liable. We have, however, considered it necessary to discuss this question to give guidance to the courts below.

The only point urged by the learned Counsel for the respondent is that the prosecution was incompetent inasmuch as the complaint was preferred by the Executive Officer of the Municipal Board. The learned Counsel refers to a notification of the State Public Health Department no. 10305/XVI(PH)—461-52, dated

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THE MUNICIPAL BOARD, BARA BANKI v. FAKHRUL HASAN

Nigam, J.

December 16, 1955, by which the State Government authorised all Municipal Medical Officers of Health, all District Medical Officers of Health, Senior Medical Officers of the Cantonment Boards and Divisional Medical Officers of various Indian Railways to institute or to give written consent for instituting prosecutions under Act XXXVII of 1954. The learned Counsel also referred us to the provisions of section 20. Section 20 lays down that "no prosecution for an offence. . . . . shall be instituted except by, or with the written consent of, the State Government or a local authority or a person authorized in this behalf by the State Government or local authority." The learned Counsel had to concede that the local authority, i.e., the Municipal Board of Bara Banki, could also have authorised any of its officers to institute a prosecution or to consent in writing to a prosecution. Thus the objection urged by the learned Counsel raises a question of fact as to whether the Municipal Board of Bara Banki had or had not authorised the Executive Officer to institute or to give consent to such prosecutions. This question does not appear to have been raised in the trial court, nor was it raised in the grounds of appeal before the learned Additional Sessions Judge. We, therefore, do not find it possible to allow the learned Counsel to raise this question at this stage From the fact that the Food Inspector requested the Executive Officer to institute the prosecution it appears to us to have been the general practice for such prosecutions to be instituted by the Executive Officer and there is no reason to suspect that the Executive Officer was not acting in accordance with rules or in excess of his powers.

The last point urged by the learned Counsel is as regards the amount of the fine. We are unable to consider that the fine imposed on the respondent is excessive.

We, therefore, accept this appeal, set aside the order of acquittal recorded by the learned Additional Sessions Judge and restore the conviction and the fine awarded by the learned Sub-Divisional Magistrate, Nawabganj, district Bara Banki. The respondent will pay the fine within ten days of today or surrender in the court of the Sub-Divisional Magistrate, Nawabganj, Bara Banki, to undergo the sentence imposed on him in default.

Appeal allowed.

CIVIL MISCELLANEOUS

*Before Mr. Justice Tandon and Mr. Justice Misra.**

SRI KEDAR NATH SETHI (PETITIONER)

v.

1961
March 19

LIFE INSURANCE CORPORATION OF INDIA THROUGH SRI T. S. SWAMINATHAN, ZONAL MANAGER AND ANOTHER (RESPONDENTS)

Life Insurance Corporation Act, 1956, *s.* 11(1)—*Corporation's power to alter terms regarding transferred employees—S.* 49 *(b), covered cases of transferred employees—S.* 49*(bb), introduced by Amending Act removed all doubts—S.* 22(3), *Entrustment of superintendence and directions in Zonal Manager, Meaning of—S.* 3 *of Essential supplies* (1) *Temporary Powers Act* 1946, *sub-section* (2) *of s.* 2 *of Defence of India Act,* 1939.

Even a cursory reading of sub-section (1) of section 11 of this Act will convince that the transferred employees were to continue in the service of the corporation on the old terms and conditions until these were duly altered by the corporation. That is the corporations possessed the power to alter those terms and conditions which once they were altered ceased in favour of the new terms and conditions to be in force in their earlier shape.

The clause (*b*) of s. 49 of the Act already covered the cases of transferred employees and clause (*bb*) has been introduced simply for the sake of ending all doubts which might have existed in that behalf.

There is another reason on account of which the corporation possessed the necessary authority to make regulation in case of transferred employees also. The main power to make regulations is derived under sub-s. (1) and sub-s. (2) of s. 49 in stating the various matters upon which the regulations may be made is illustrative only. The power itself, and with which we are concerned, to make regulations belongs under sub-s. (1). The words "such regulations may provide for" in sub-s. (2) clearly point out that the regulations providing for, the matters enumerated in clauses (*a*) to (*m*) will still be made under sub-s. (1). The matters which are stated in sub-s. (2) are same only of the matters for which provision may be expedient for purpose of giving effect to the provisions of the Act, but they are not all those matters for which provision can be made.

*Sitting at Lucknow.

Sub-section (1) of section 11 is indeed one of the matters for which provision is necessary for giving effect to the provisions of Act. The list of the matters in sub-section (2) is thus neither descriptive nor exhaustive. It is on the other hand illustrative. In order to find out whether the corporation is competent to make regulations on particular subject or matter the test is not to discover the particular matter in the various items contained in sub-section (2) but to look to the Act itself and if the Act has contemplated provision by regulation of such matter, it will be open to the corporation in the exercise of the power given to it by sub-section (1) to make regulations for giving effect to it.

The power of superintendence and direction given to the Zonal Manager by the section will thus extend to all administrative matters concerning his zone including his subordinate office. Since the Zonal Manager is entrusted with the affairs and business of the Zonal Office he has a legal duty cast upon him to see that the affairs are conducted properly and in accordance with law. If any employee or servant acts in a manner which Zonal Manager considers is detrimental or injurious to the officers and business which is entrusted to his superintendence and direction he will certainly be within his powers to take such action as is deemed suitable by him. The suspension of employee pending enquiry into the charges against him is certainly a matter which he will be competent to order. Therefore upon a reading of section 22 itself we are satisfied that the Zonal Manager had the power to make the suspension order.

Case-law discussed.

Writ Petition no. 288 of 59.

The facts appear in the judgment.

V. P. Misra for the appellant.

Jagdish Swarup, Sudershan Dayal and *Sudhir Shanker* for the respondent.

The judgment of the Court was delivered by—

TANDON, J:—The petitioner Sri Kedar Nath Sethi is an employee of the Life Insurance Corporation of India since its inception. The history which preceded the constitution of the corporation, in so far as it is relevant here, is that there used to be a number of insurance companies in the country which carried on life insurance

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business. This business which has been called as controlled business was as a result of the nationalisation transferred and vested in the corporation. The employees of these erstwhile companies were also transferred in the process under the employment of the corporation.

Section 11 of the Life Insurance Corporation Act which made provision for the transfer of the services of such employees laid down that every whole-time employee of an insurer, i.e., an erstwhile insurance company whose controlled business had been transferred to and vested in the corporation and who was employed by the insurer wholly or mainly in connection with his controlled business immediately before the appointed day, *i.e.* the 1st September, 1956, shall, on and from that day become an employee of the corporation. The section further laid down that such employee shall hold his office in the corporation by the same tenure, at the same remuneration and upon the same terms and conditions and with the same rights and privileges as to pension and gratuity and other matters as he would have held the same on the appointed day if the said Act had not been passed and further that he shall continue to do so unless and until his employment in the corporation is terminated or until his remuneration, terms and conditions are duly altered by the corporation.

In pursuance of the above provision Sri Sethi became an employee of the corporation. It is material to point out just now that according to the terms and conditions applicable to him his salary was below Rs.500. This will be relevant in considering the applicability of certain regulations which in due course were promulgated by the corporation governing the conditions of service, etc., of the staff working under it.

Sri Sethi held the post of Inspector and as such belonged to the field staff. In the performance of his duty he

had to take work from agents and also received premium from policy holders, etc., towards policies held or proposed by them. It is alleged that Sri Sethi in the performance of his said duty received two items of Rs.45.86 n.P. from one Dr. Kapoor whose life policy had lapsed on account of non-payment but instead of paying the said amounts into the corporation he retained them and deposited the same in his personal account. A relative charge-sheet accusing him of misappropriating these amounts was, therefore, delivered to him on the 15th of July, 1959. A second charge-sheet accusing him of misappropriating four other items was also given to him on the 29th August, 1959. The charge against him in brief was that he misappropriated those amounts, hence was guilty of misconduct and deserved to be punished.

The above charge-sheets were given to him by the Zonal Manager, Sri T. S. Swaminathan, who further suspended him till the completion of the inquiry against him. The inquiry was then entrusted to Sri C. M. Sharma, an officer of the corporation, who is respondent no. 2.

It is not necessary for us to state here all those facts which have been alleged in the case by the two parties since they have come to an agreement before us wherefore the petitioner will be allowed by the present Zonal Manager a reasonable opportunity to show cause on the charges delivered to him including an opportunity to adduce such further evidence or to cross-examine any witnesses already examined as he should consider necessary before the final action is decided against him. In view of this agreement it is no longer necessary for us to consider that part of the case which concerns the inquiry by Sri C. M. Sharma and the competence of that officer to hold the same. The parties, however,

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agreed that the Zonal Manager will not be disentitled from looking into the report of Sri Sharma should he so consider it necessary but in that case he will give an opportunity to the petitioner to urge whatever he has to urge against it and to contest it. Thus out of the several reliefs which the petitioner has asked the controversy which we are called upon to decide is with regard to the suspension order dated the 15th July, 1959, made by the Zonal Manager.

The petitioner's attack on the validity of the suspension order is two fold. Firtsly, he claims that as an employee of an erstwhile insurer he was governed in the matter of his employment by the same terms and conditions, etc., as were applicable to him while in the employ of the insurer and that, therefore, his employment could be terminated by the corporation as such and not by any subordinate authority. In this manner he claims that the Zonal Manager could not make the impugned order while the Life Insurance Corporation of India (Staff) Regulations, 1956, framed by the corporation in the purported exercise of its power under clause (*b*) of sub-section (2) of section 49 were in excess of its authority under the said provision. Secondly, he has contended that even the Staff Regulations do not confer authority on the Zonal Manager to make the order of suspension in his case in view of sub-clause (*c*) of clause (iii) of Regulation 9 which declared the Divisional Manager to be his appointing authority and clause (4) of Regulation 41 authorised the Divisional Manager to pass such an order.

It will be necessary in the course of discussion to refer to the following provision of the Life Insurance Corporation Act. Sub-section (1) of section 11 to which reference exists earlier also made provision for transfer of services of employees of the erstwhile insurers. Sub-section (2) of the same section gave authority to the

Central Government to reduce the remuneration, etc., of such employees where it was satisfied that it was necessary so to do for the purpose of securing uniformity in the case of remuneration and other terms and conditions of service applicable to them. Admittedly the Staff Regulations, 1956, have no reference to this provision.

The next provision to be referred is section 18 which is thus—

"18. (1) The central office of the corporation shall be at such place as the Central Government may, by notification in the official *Gazette*, specify.

(2) The corporation shall establish a zonal office at each of the following places, namely, Bombay, Calcutta, Delhi, Kanpur and Madras, and, subject to the previous approval of the Central Government, may establish such other zonal offices as it thinks fit.

(3) The territorial limits of each zone shall be such as may be specified by the corporation.

(4) There may be established as many divisional offices and branches in each zonal as the Zonal Manager thinks fit."

The next relevant provision is to be found in section 22 which is as follows:

"22. (1) The corporation may entrust the superintendence and direction of the affairs and business of a zonal office to a person, whether a member or not, who shall be known as the Zonal Manager and the Zonal Manager shall perform all such functions of the corporation as may be delegated to him with respect to the area within the jurisdiction of the Zonal office."

(2) .....

(3) ....."

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Then we come to section 49. Sub-section (1) of this section is—

"The corporation may with the previous approval of the Central Government, by notification in the *Gazette of India*, make regulations not inconsistent with this Act and the rules made thereunder to provide for all matters for which provision is expedient for the purpose of giving effect to the provisions of this Act."

And sub-section (2) provides—

"In particular, and without prejudice to the generality of the foregoing power, such regulations may provide for—

(*a*) .....

(*b*) the method of recruitment of employees and agents of the corporation and the terms and conditions of service of such employees or agents.

(*bb*) the terms and conditions of service of persons who have become employees of the corporation under sub-section (1) of section 11.

....."

The Staff Regulations, 1956, were prepared in that year and the Preamble thereto read thus—

"Whereas it is necessary to frame regulations defining the terms and conditions of service of the staff of the Life Insurance Corporation of India, the Corporation, in exercise of the powers vested in it under clause (*b*) of sub-section (2) of section 49 of the Life Insurance Corporation Act, 1956, and with the previous approval of the Central Government, is pleased to make the following regulations."

Then follow the several regulations but we shall be concerned primarily with two only, viz., regulations 9 and 41. Regulation 9 declared the Divisional Manager, since the petitioner was employed in the Branch Office in the divisions, to be his appointing authority. And Regulation 41 in making provision for the imposition of penalities upon delinquent employees lays down in clause (2) that, except the punishment of reprimand or censure, other penalities including dismissal and reduction to a lower post can be ordered by the appointing authority after a charge has been formulated in writing and an opportunity has been given to the delinquent servant to show cause against it. Under Clause (4) the power of suspension during inquiry has been made exercisable by an officer who is empowered to pass the final order under the regulation. The final order, it is conceded, can be made in the case of the petitioner by the Divisional Manager.

In the view that we are inclined to take about section 22 of the Act, *qua* the Zonal Manager's power to suspend an employee working in his zone, it should not be necessary to enter into the controversy raised by the petitioner that the Staff Regulations are invalid and in excess of the power vested in the corporation in their applicablity to the employees of the erstwhile insurers hereafter referred to as transferred employees. But since the question has been canvassed at length before us we consider it our duty to record a finding on that question also.

Even a cursory reading of sub-section (1) of section 11 of the Act will convince that the transferred employees were to continue in service of the corporation on the old terms and conditions until these were duly altered by the corporation. That is the corporation possessed the power to alter those terms and conditions which once they were altered ceased in favour of

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the new terms and conditions to be in force in their earlier shape. The learned Counsel for the petitioner has conceded that sub-section (1) of section 49 conferred power upon the corporation to make regulations to provide for all matters for which it considered expedient for giving effect to the provisions of the Act. The provision in sub-section (1) of section 11 that the old terms and conditions will continue until new terms and conditions are duly laid by the corporation, read with the above provision in sub-section (1) of section 49, authorised the corporation to provide by appropriate regulations new terms and conditions. Any regulations in that behalf will, indeed, be for the purpose of giving effect to the provisions of the Act and, therefore, within the competence of the corporation to make.

There is no dispute or controversy so far. The Staff Regulations, as will be clear from the Preamble quoted earlier, were framed in the purported exercise of the power under clause (*b*) of sub-section (2) of section 49. This clause authorised the making of provision for the method of recruitment of employees and agents of the corporation and the terms and conditions of service of such employees and agents. A transferred employee, whose services came under the corporation by reason of sub-section (1) of section 11, was, such is the argument of the petitioner, not an employee recruited by the corporation; therefore clause (*b*) which, according to him, made provision for that category of employees alone failed to authorise the corporation to make regulations regarding the terms and conditions of transferred employees.

While it may be said with some force that a transferred employee will not be an employee recruited by the corporation but it may not be necessary to enter further into that controversy since we are unable to

hold that the words "such employees or agents" appearing in clause (*b*) have reference to those employees only who may have been recruited by the corporation subsequently. The first part of clause (*b*) does provide for the making of regulations about the method of recruitment of employees and agents of the corporation but the later part and particularly the word "such", preceding the words "employees or agents" do not themselves refer merely to employees and agents so recruited. The word "such" refers to employees and agent of the corporation and not to employees and agents of the corporation who might have been recruited by the corporation. Had the intention been to restrict the reference to recruited employees only the correct description would have been something like this: "and the terms and conditions of service of employees or agents so recruited". The learned counsel for the petitioner has not disputed that the corporation possessed the power to make regulations providing for the terms and conditions of transferred employees also. Until clause (*bb*) was inserted in sub-section (2) by the Life Insurance Corporation (Amendment) Act, 1957 (Act 17 of 1957), there was, apart from clause (*b*), no specific provision for making regulations in the case of transferred employees. Once it is conceded that the corporation possessed authority to make regulations in their case too, the purpose of the enactment will be advanced by giving to clause (*b*) the interpretation that the power in it to lay down the terms and conditions of employees and agents of the corporation was not limited to the case of recruited employees only but was available in the case of transferred employees as well.

That this, indeed, was the intention of the Legislature too is confirmed by the Amendment Act of 1957. In making this amendment which was enacted with retrospective effect the amending Act expressly said that the

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new clause shall be and shall be deemed always to have been inserted. In the Statement of Objects and Reasons it was again said (*see* the *Gazette of India Extraordinary*, Part II, dated the 20th May, 1957, page 174) that section 49 (2) was being amended to make it clear that the power conferred by clause (*b*) of sub-section (2) of section 49 was available in the case of all employees whether recruited by the corporation or taken over on its incorporation. The relative bill of which the objects and reasons were in a sense a part had thus been introduced to remedy and remove supposed doubts in the language of clause (*b*), when actually the legislative intention was to cover the cases both of the recruited employees and transferred employees. As was held by their Lordships of the Supreme Court in *M. K. Ranganathan* v. *Govt. of Madras* (1)—

> "the statement of objects and reasons is certainly not admissible as an aid to the construction of a statute. But it can be referred to for the limited purpose of ascertaining the conditions prevailing at the time which actuated the sponsor of the bill to introduce the same and the extent and urgency of the evil which he sought to remedy."

Clause (*bb*) which thus got into the body of the Act cannot be used to show that clause (*b*) did not apply to the case of transferred employees. In fact it went to prove that it actually so applied but any doubts in that behalf were removed.

In our opinion, therefore, clause (*b*) already covered the case of transferred employees and clause (*bb*) has been introduced simply for the sake of ending all doubts which otherwise might have existed in that behalf.

There is another reasons also on account of which we have no doubt that the corporation possessed the neces-

(1) A.I.R. 1955 S. C. 604

sary authority to make the regulation in the case of transferred employees also. The main power to make regulations is derived under sub-section (1). Sub-section (2) of section 49 in stating the various matters upon which regulations may be made is illustrative only. The power itself, and with which we are concerned, to make regulations belongs under sub-section (1). The words "such regulations may provide for" in sub-section (2) clearly point out that the regulations providing for the matters enumerated in clauses (a) to (m) will still be made under sub-section (1). The matters which are stated in sub-section (2) are some only of the matters for which provision may be expedient for the purpose of giving effect to the provisions of the Act, but they are not all those matters for which provision can be made. Sub-section (1) of section 11 is, indeed, one of the matters for which provision is necessary for giving effect to the provisions of the Act. The list of matters in sub-section (2) is thus neither descriptive nor exhaustive. It, on the other hand, is illustrative. In order to find out whether the corporation is competent to make regulations on a particular subject or matter the test is not to discover the particular matter in the various items contained in sub-section (2) but to look to the Act itself. And if the Act has contemplated provision by regulation of such a matter, it will be open to the corporation in exercise of the power given to it by sub-section (1) to make regulations for giving effect to it.

The Privy Council in the case of *Emperor* v. *Sibnath Banerji* (1) considered a similar provision in the Defence of India Act, 1939, which conferred power on the Central Government to make rules for securing the defence of British India (as it then was) the public safety, the maintenance of public order or the efficient

(1) A.I.R. 1945 P.C. 156.

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prosecution of war, or for maintaining supplies and services essential to the life of the community. Sub-section (2) of section 2 of that Act, which is essentially on the same lines as sub-section (2) of section 49 of the Life Insurance Corporation Act, 1956 and enumerated a number of matters on which the Central Government might without prejudice to the generality of the power conferred by sub-section (1) make rules, came up for consideration. Reversing the decision of the Federal Court it was held :

> "The function of sub-section (2) of section 2 is merely an illustrative one; the rule-making power is conferred by sub-section (1), and 'the rules' which are referred to in the opening sentence of sub-section (2) are the rules which are authorised by, and made under sub-section (1); the provisions of sub-section (2) are not restrictive of sub-section (1)."

The above decision was noted with approval by the Supreme Court in the case of *Santosh Kumar Jain* v. *The State* (1). This was a case under the Essential Supplies (Temporary Powers) Act, 1946. Section 3 of this Act authorised the Central Government to make orders for maintaining or increasing supplies, etc., of essential commodities: sub-section (1) conferred the general power in that behalf while sub-section (2) provided that without prejudice to the generality of the powers conferred by sub-section (1) an order made thereunder may provide for the several matters stated in sub-section (2).

Section 49 of the Life Insurance Corporation Act is essentially similar to section 3 of the Essential Supplies (Temporary Powers) Act, 1946. In either case there is reference, though in slightly different terms, to an order

(1) A.I.R. 1951 S.C. 201.

made under sub-section (1). The learned Judges approving the decision in *Sibnath Banerji's* case (1) held that the matters specifically enumerated in sub-section (2) were merely illustrative, the order itself is precisely under sub-section (1). Now since the impugned regulations, though purporting to have been made under clause (*b*) of sub-section (2) of section 49 of the Act are really made under sub-section (1); thus if sub-section (1) gives power to the corporation—a fact not disputed to make regulations in the case of transferred employees also, they will be within the competence of the corporation.

An aspect on which some stress was laid and which also prevailed with the learned Chief Justice in the case of *S. K. Chatterji* v. *Divisional Manager, Life Insurance Corporation of India, Lucknow Division* (2), was how far the reference in the Preamble to the regulations to clause (*b*) of sub-section (2) of section 49 affected their validity. There are two answers to this question. One is that according to the conclusion we have reached about the true meaning and scope of clause (*b*) the same covered the case of transferred employees as well. The second answer is, supposing for a moment that clause (*b*) does not cover their case, that reference to that clause will not affect the validity of the order which has to be considered on its substance and not its form. Their Lordships of the Supreme Court observed with approval in the case of *P. Balakotaiah* v. *Union of India* (3) that when an authority passes an order which is within its competence it cannot fail merely because it purports to be made under a wrong provision if it can be shown to be within its powers under any other rule and that the validity of an order should be judged on a consideration of its substance and not its form. Again

(1) A I.R. 1045 P.C. 156.
(2) Civil Miscellaneous Writ no. 248 of 1957, decided on 17th February, 1959.
(3) A I.R. 1958 S.C. 232.

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the Supreme Court in the case of *L. Hazari Mal Kuthiala v. Income-tax Officer, Special Circle, Ambala Cantt* (1) held :

> "The exercise of a power will be referable to a jurisdiction which confers validity upon it and not to a jurisdiction under which it will be nugatory.
>
> "Where the Commissioner of Income-tax when transferring a case from Patiala to Ambala purported to act under section 5 (5) and (7A) of the Indian Act, while he should have acted under section 5 (5) of the Patiala Act, the fact that he referred to the Indian Act does not make the action of the Commissioner as one without jurisdiction."

In the above case the reference was to a provision in an entirely different Act which further was passed by a different Legislature when it should have been to the relative provision in the Indian Income Tax Act, still the exercise of the power was upheld as its exercise will be referable to a jurisdiction which confers validity upon it and not to a jurisdiction under which it will be nugatory.

Therefore, assuming for a moment that clause (*b*) of sub-section (2) of section 49 of the Life Insurance Corporation Act failed to give the necessary authority to the corporation to make the impugned regulations in the case of transferred employees, these regulations must be held to have been made, despite the wrong reference, to the jurisdiction vested in the corporation which is under sub-section (1).

We have been referred in the course of arguments to the decision of the then learned Chief Justice in *S. K. Chatterji's* case where he held that these regulations were inapplicable to transferred employees because clause (*b*) failed to authorise the corporation to make the same in their case. Naturally we have carefully

(1) A.I.R. 1961 S.C. 200.

considered the view held by the learned Chief Justice but with profound respect we cannot agree with him. The aspect that the regulations were framed under sub-section (1) of section 49 and not under any provision in sub-section (2) was not placed before him. The stress in the case before him was whether clause (b) on its language covered the case of transferred employees and he held the view, with which also we respectfully disagree, that the clause was inapplicable to transferred employees. Disagreeing with the above decision we are of the opinion that the corporation has the power to make regulations in the case of transferred employees and further that the impugned regulations are applicable to them.

We may now revert to a consideration of the question whether the suspension order by the Zonal Manager was within his competence. The learned Counsel for the corporation has tried to support it on two independent grounds. Firstly, he has relied on section 22 of the Life Insurance Corporation Act, 1956, which armed the Zonal Manager with the power of superintendence and direction over the zonal office and secondly on regulation 9 read with regulation 41. The relevant portion of section 22 has been quoted earlier and it will appear from it that superintendence and direction of the affairs and business of a zonal office can be entrusted by the corporation to the Zonal Manager. That such an entrustment has been made in favour of the Zonal Manager in question is not in dispute before us. What is contested is whether the Zonal Manager will by reason of the superintendence and direction entrusted to him possess the power to suspend an employee in a branch office to which office the petitioner happened to be attached. The scheme of the Life Insurance Corporation Act in the matter of management is to be found in Chapter V of the Act. Section 18 makes provision for the establishment of zonal offices one of which is

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in Kanpur. It also makes provision for territorial delimitation of the limits of each zone and lastly provides in sub-section (4) that there may be established as many divisional offices and branches in each zone as the Zonal Manager thinks fit. In section 22 provision exists for the entrustment of the superintendence and direction of the affairs and business of the zonal office in the Zonal Manager.

The learned Counsel for the petitioner contended that section 22 while conferring power of superintendence and direction on the Zonal Manager confined it to the establishment of the zonal offices. In other words, a branch office and for the matter of a Divisional Office which are separate units do not, therefore, enter into the superintendence and direction of the Zonal Manager. A zonal office is established for the territory comprised in the zone. A branch office and a Divisional Office is a part of the zone and are further instituted by the Zonal Manager as a step for the due management of the zonal office. The expression "zonal office" in section 22 will, therefore, not only include the establishment known by that name but also the establishment attached to every subordinate office controlled by the zone.

The power of superintendence and direction given to the Zonal Manager by this section will thus, extend to all administrative matters concerning the zone including the subordinate office. Since the Zonal Manager is entrusted with the affairs and business of the zonal office he has a legal duty cast upon him to see that the affairs are conducted properly and in accordance with law. If any employee or servant acts in a manner which, the Zonal Manager considers, is detrimental or injurious to the affairs and business which is entrusted to his superintendence and direction he will certainly be within his powers to take such action as is deemed suit-

able by him. The suspension of an employee pending inquiry into charges against him is certainly a matter which he will be competent to order. Therefore, upon a reading of section 22 itself we are satisfied that the Zonal Manager had the power to make the suspension order. At the same time, we have not been shown or convinced that the order passed by him was otherwise invalid.

In the above view of the matter it is not necessary for us to discuss the second ground on which the learned counsel for the corporation has supported the particular order.

In view of the above discussion the suspension order cannot be held to be invalid. In the result, therefore, the relative relief asked by the petitioner cannot be granted. As to that part of the case which concerned the inquiry on the charges conducted by respondent no. 2 the parties have arrived at a mutual arrangement which has been reproduced in an earlier part of this judgment. We need, therefore, make no further order than direct the respondents to give effect to the arrangement before mentioned arrived at between them. No order is made as to costs. The stay order is withdrawn.

Petition dismissed.

APPELLATE CIVIL

*Before Mr. Justice Oak and Mr. Justice Srivastava**

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April, 4

RAJENDRA NATH RAZDAN (DEFENDANT)

v.

SRIMATI LALLI DEVI (PLAINTIFF)

U. P. (Temporary) Control of Rent and Eviction Act, 1947, *S. 3 and Transfer of Property Act,* 1882, *S.* 106—*Notice of ejectment, terminating tenancy by 5th October,* 1954 *and to pay arrears of rent by 10th Octobe,* 1954 (*i.e., within* 30 *days*) *held valid.*

Section 3 of the Rent Control and Eviction Act has no effect of suspending or overriding the provisions of section 106 Transfer of Property Act. The two provisions are independent of each other to be operative in their own respective fields.

In order to have an effective remedy of ejectment through a court of law landlord has two obstacles to overcome In the first place he must determine the tenancy in one of the ways mentioned in the Transfer of Property Act. Without determining tenancy his right of re-entry does not accrue. But the determination of tenancy under the Transfer of Property Act alone is not enough. If U. P. Act III of 1947 applies and he wants to eject the tenant through a suit he has to comply with the provisions of s. 3 of that Act also. If one of the contingencies mentioned in clause (i) of that section exists he may file a suit without the permission of the District Magistrate; otherwise he has to obtain that permission. Both these obstacles can be overcome either at the same time or at different stages, one after the other. There appears to be nothing in either of the two provisions which may require the compliance of one must be made before the other. On the contrary it is noticeable that s. 3 of U. P. Act III of 1947 seeks to put a restriction not on the landlord's right to determine the tenant's lease but on his right to file a suit for the ejectment of the tenant as a consequence of the determination.

Case-law discussed.

Second Appeal No. 386 of 1956 from a decree of B. B AGARWALA, Civil and Sessions Judge, Bara Banki, dated 13th August, 1956.

The facts appear in the judgment.

M. L. Trivedi, for appellant.

Sri Ram Jee, for respondent.

*Sitting at Lucknow.

The judgment of the Court was delivered by—

SRIVASTAVA, J.:—This is a tenant's second appeal and the sole point sought to be raised relates to the validity of the notice of ejectment. The second appeal came up first before Mr. Justice NIGAM, who found that the view he was inclined to take might require the reconsideration of the decision in *Ram Krishna Prasad* v. *Mohammad Yahia* (1). He, therefore, referred the appeal to a Division Bench. That is how the appeal is now before us.

The facts are simple and can be briefly stated. The appellant was a tenant of the premises in question on Rs.15 per month. A notice under section 106 of the Transfer of Property Act was served upon him determining his tenancy with effect from the 5th of October, 1954. By the same notice he was also required to pay up the arrears of rent due from him within 30 days of the receipt of the notice. The notice was received on the 10th of September, 1954. Thus, though his tenancy stood determined with effect from the 5th of October, 1954, the appellant was given time till the 10th of that month for paying the arrears. The notice not being complied with the landlord filed a suit for ejectment and recovery of arrears of rent. He also claimed damages for the use and occupation in respect of the period subsequent to determination of the tenancy. The suit was contested mainly on the ground that the notice was invalid. The plea was over-ruled by the trial court which decreed the suit. An appeal to the Additional Civil Judge being infructuous the tenant filed the present second appeal.

When the second appeal was argued before Mr. Justice NIGAM it was urged on the basis of the decision in *Ram Krishna Prasad* v. *Mohammad Yahia* (1) that the appellant having been given time till the 10th of

(1) 1960 A.L.J. 579.

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September, 1954, to pay the arrears it was not open to the landlord to determine the tenancy with effect from the 5th of September. Mr. Justice NIGAM was not inclined to accept this contention and referred the case to a Division Bench. Since then the case in *Ram Krishna Prasad* (1) has been over-ruled by a Division Bench of this Court in *Jagat Narain* v. *Madan Lal* (2).

Learned counsel for the appellant however strenuously pressed before us the contention that section 3 of the Rent Control and Eviction Act had in effect brought section 106 of the Transfer of Property Act in a virtual state of suspension. A notice determining a tenancy under the latter provision could, according to the learned Counsel, be issued by the landlord only if one of the contingencies contemplated by the former had come into existence. Till that event had happened it was not permissible for the landlord, urged the learned counsel, to serve a notice of ejectment in order to determine the tenancy of the tenant.

We are unable to accept the contention. We find nothing in section 3 of the Rent Control and Eviction Act which can have the effect of suspending or overriding the provisions of section 106 of the Transfer of Property Act. The two provisions are, in our opinion, independent of each other to be operative in their own respective fields. They are in no way in conflict with each other. In order to have an effective remedy of ejectment through a court of law a landlord has two obstacles to overcome. In the first place he must determine the tenancy in one of the ways mentioned in the Transfer of Property Act. Without determining tenancy his right of re-entry does not accrue. But the determination of tenancy under the Transfer of Property Act alone is not enough. If U. P. Act III of 1947 applies and he wants to eject the tenant through a suit he has to comply with the provisions of section

(1) 1960 A.L.J. 879.

(2) Second appeal no. 1694 of 1952. decided on 28th March 1961.

3 of that Act also. If one of the contingencies mentioned in clause (1) of that section exists he may file a suit without the permission of the District Magistrate; otherwise he has to obtain that permission. Both these obstacles can be overcome either at the same time or at different stages, one after the other. There appears to be nothing in either of the two provisions which may require the compliance of one must be made before the other. On the contrary it is noticeable that section 3 of U. P. Act III of 1947 seeks to put a restriction not on the landlord's right to determine the tenant's lease but on his right to file a suit for the ejectment of the tenant as a consequence of the determination. We, therefore, find it difficult to see on what basis the learned counsel can argue that till one of the contingency contemplated by section 8 of U. P. (Temporary) Control of Rent and Eviction Act has come into existence it is not open to the landlord to determine the tenancy by a notice as required by section 106 of the Transfer of Property Act.

Two single Judge decisions were relied upon by the learned counsel in support of his contention. They are *Khumani* v. *Saktey Lal* (1) and *Ram Sarup* v *Smt. Gayatri Devi and Munna Lal* (2). Neither of these cases lays down the proposition which the learned counsel contends for. In the first mentioned case rent having fallen in arrears a notice was served on the 16th of January, 1947, under section 3-A of the Rent Control and Eviction Act calling upon the tenant to pay the rent due within one month. The tenant sent in reply only a part of the amount claimed which the landlord refused to accept. On the 20th of March, 1947, the landlord served the notice required by the Transfer of Property Act determining the tenancy. He then filed a suit in April, 1947 for ejectment and arrears of rent. The suit was decreed by the trial court as well as the

(1) 1961 A.L.J. 331. (2) 1952 A.L.J. 373.

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court of first appeal and the decree of the courts below was upheld by Mr. Justice KIDWAI in second appeal. It was argued in support of the appeal that because the rent that was really due had been paid the suit for ejectment was not maintainable. Dealing with that contention the learned Judge observed :

> "The general law permits the ejectment of a tenant after giving him 15 days notice terminable with the month of the tenancy. The Special Law, namely, the Control of Rent and Eviction Act, restricts that right and provides that the landlord cannot evict a tenant unless, among other things, the tenant makes a wilful default in the payment of rent within one month of the service of notice of demand upon him. In the present case such a notice was issued and the tenant failed to make payment within the time allowed. Thereafter the parties were relegated to the general law and, according to the general law, the plaintiff landlord was entitled to evict after giving the requisite notice. This he proceeded to do and, therefore, the suit was competent even though the defendant had thereafter tendered the whole amount of the rent due."

In the other case the notice demanding rent as required by section 3-A of the Rent Control and Eviction Act was sent on the 14th of September, 1948. A portion of the amount claimed was sent in reply to the notice, but was not accepted. Subsequently a notice under section 106 of the Transfer of Property Act was also sent on the 4th of April, 1949, and the tenancy was determined. A suit for ejectment then followed and it was contended that it was not maintainable on account of waiver. Relying on the earlier decision of *Khuman* v. *Saktey Lal* (1) the learned Judge observed :

(1) 1961 A.L.J. 331.

"Learned Counsel for the appellant in this connection urged that, in view of the long interval of time between the 14th October, 1949, when the defendants became liable for wilful default and July 11, 1949, when the suit was filed, it must be taken that the plaintiff had waived her right to eject them. It is, however, settled law that a mere permission obtained by the landlord under section 9(a) of the U. P. (Temporary) Rent Control and Eviction Act does not entitle him to file a suit for ejectment straight away. He has still to serve a notice on the tenant under section 106 of the Transfer of Property Act. This position was affirmed in a case of this Court in *Khumani* v. *Saktey Lal* (1) where the following remark was made:

'Where a notice is issued and the tenant fails to make payment within the time allowed, the parties are relegated to the general law and the landlord is entitled to evict after giving the requisite notice.'

The notice given in the present case to the defendants under section 106 of the Transfer of Property Act would not only account for part of the interval of time between the aforesaid dates but serve as strong evidence of the plaintiff's intention to terminate the lease and negative all idea of a waiver on her part."

On the other hand in a more recent case of *Ratti Ram* v. *Mithan Lal* (2) permission was granted under section 9 of the Rent Control and Eviction Act, but a notice for ejectment under the Transfer of Property Act was issued before the permission could become effective. When subsequently a suit for ejectment was filed it was contested on the ground of invalidity of the notice and the defect pointed out was that the notice had been issued at a time when the landlord had no right to eject the tenant. It was urged that a notice

(1) 1961 A.L.J. 331. (2) 1961 A.L.J. 124.

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under section 106 of the Transfer of Property Act could be given only by a person who at the time of sending the notice had the right to determine the tenancy; and that right, in a case in which the permission of the District Magistrate had to be obtained before a suit for the eviction of the tenant could be filed, could arise when that permission had been granted. This contention was rejected. It was observed :

> "It is impossible in our judgment to construe the sub-section as also placing a ban on the termination of the tenancy by a notice under section 106."

The notice under section 106 of the Transfer of Property Act was held in that case to have effectively determined the tenancy even though the permission granted under section 3 of the U. P. (Temporary) Control of Rent and Eviction Act had not become effective. This decision, in our opinion, provides an answer to the contention of the learned Counsel for the appellant that the notice of ejectment in the present case could not have been issued till the default had occurred as contemplated by section 3(1) of the (Temporary) Control of Rent and Eviction Act.

The only thing required was that the notice issued by the landlord should have fulfilled the requirements of section 106 of the Transfer of Property Act as well as section 3 of the Rent Control and Eviction Act. In the present case it is not disputed that the notice fulfilled both the requirements. There was certainly an interval of five days between the date of the termination of the tenancy and the date on which the plaintiff became entitled to file a suit. But the only effect of this interval of five days was that the suit could not be filed immediately after the tenancy has been determined and the landlord had to wait for five days before filing it. If during this period of five days the rent claimed

was paid his right to file a suit would not have come into existence and his notice of determining the tenancy would have proved abortive, but if the default was made and the rent was not paid within the period as the tenancy had already been determined the right of suit also came into existence and the landlord could file a suit and get his remedy of ejectment.

We are, therefore, unable to agree with the contention of the appellant that the notice of ejectment in the present case was defective. The suit could not, therefore, fail on that account. The decree passed by the courts below thus appears to be correct. The appeal must fail and is dismissed with costs.

Appeal dismissed.

(FULL BENCH) APPELLATE CIVIL

*Before the Honourable M. C. Desai, Chief Justice, Mr. Justice Nigam and Mr. Justice Misra**

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April, 10.

THE CHIEF CONSERVATOR OF FOREST, U. P. AND OTHERS (APPELLANT)

v.

D. A. LYALL (RESPONDENT)

Financial Handbook, Vol. II rr. 12-A and 14—*Confirmation to a Government post occupied by probationary servant—Status of confirmed Government servant, how acquired—If acquired by mere lapse of time—Whether acquires the status of "quasi permanent servant"—Doctrine of automatic confirmation.*

A Government servant on probation is not to be deemed to be confirmed on the expiry of the period of his probation, if no orders confirming him in his substantive post or extending his period of probation are passed by the competent authority and that the orders confirming the officer, terminating his appointment or extending the period of probation may be passed even after the expiry of the period of probation provided the decision is based on the work and conduct during the period of probation.

The confirmation to a Government post occupied by a probationary servant is not a right which accrues to him automatically on the expiry of the period of probation. He acquires the status of a confirmed Government servant on that post only as a result of an affirmative order passed by the competent authority. The period of probation is a period of trial which affords an opportunity to the authority to observe the performance of the servant on the post and to make up its mind on the expiry of the said period whether the servant is fit to be confirmed or not.

In other words, from the mere lapse of the period of probation it cannot be assumed that the servant has been confirmed, such an assumption would mean curtailment of the period of probation, which is not permitted.

If within a reasonable time the authority does not pass an order confirming the servant or extending his period of probation or terminating his service it will still not lead to the assumption that he has been confirmed, his remedy could simply be to apply for a *mandamus* calling upon the authority to pass an appropriate order within a certain time.

*Sitting at Lucknow.

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In the absence of a provision in the contract or rules of service a servant cannot be presumed to have been confirmed after the lapse of any time since the expiry of the period of probation.

Mere expiry of the period of probation is not enough for confirmation, the person must have passed all prescribed tests and he must have been found to be fit to the satisfaction of the Governor. The existence of these conditions is quite inconsistent with the doctrine of automatic confirmation

A Government servant at no stage acquires a status of a 'quasi-permanent' servant He can be either a probationary servant or a confirmed servant if so made by the authority concerned.

Case-law discussed.

Special Appeal No. 9 of 1960 against the order of TANDON, J., dated 22nd September, 1959, in Civil Miscellaneous Writ No. 22 of 1958.

The facts appear in the judgment.

Additional Standing Counsel, for appellant.

N. Banerji, for respondent.

The judgment of the Court was delivered by—

MISRA, J.:—The question referred to the Full Bench for answer is,—

> "Whether a Government servant on probation is to be deemed to be confirmed on the expiry of the period of his probation if no orders confirming him in his substantive post or extending his period of probation are passed by the competent authority?"

It has arisen in a special appeal which has been preferred against a judgment of a learned single Judge of this Court, allowing the writ petition filed by the respondent Shri D. A. Lyall under Article 226 of the Constitution. The special appeal was heard by a Bench of which two of us were members, and, as it was

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felt that the question is of importance and had once been referred to a larger Bench but could not be decided because of some reasons, which it is not necessary to state here, the matter has come up before the Full Bench.

The facts of the case in which this question has been raised have been fully set out in the judgment of the learned single Judge. They may only be briefly touched again.

On the approval of the Public Service Commission, U. P., made in 1939, and, after necessary departmental training, Shri D. A. Lyall respondent was appointed an officiating Inspector in the Co-operative Department, U. P., on 25th April, 1941. Shortly after, in June, 1941, on his request, he was allowed to join Army service on a commissioned post where he served till 1947. Then on his application in that behalf, he was selected for service in the Forest Department, U. P., in one of the vacancies reserved for War Service candidates. By an order, dated 18th March, 1947, the Registrar Co-operative Societies, U. P., permitted him to join the Forest Department, retaining his position in the gradation list of the Inspectors, Co-operative Societies, intact. In fact, the respondent was confirmed as an Inspector in the Co-operative Department with effect from 1st October, 1948, vide order No. C. 133/ESTT., dated 17th January, 1950. After being selected for service in the Forest Department, the respondent underwent necessary training and was posted as an Assistant Conservator of Forests on probation for two years from 1st April 1949. The period of probation expired on 31st March, 1951 but no orders for his confirmation on this post were passed. No orders were either passed within two years from 1st April, 1949, extending his period of probation. His lien on his permanent post

as Inspector, Co-operative Societies, had already been suspended in 1951 by an order passed under rule 14(*b*) of the Fundamental Rules, since he was deputed to serve on a substantive post in the Forest Department. However, he was still serving as an Assistant Conservator of Forests in August, 1953, when charges were framed against the respondent by the Chief Conservator of Forests, U. P., and he was asked to explain why he should not be removed from service. The explanation submitted by the respondent to these charges was found unsatisfactory and he was discharged from service of the Forest Department with effect from 23rd February, 1954. This order was communicated to him on 21st February, 1954. The respondent made a representation against it to the U. P. Government and the order of discharge passed by the Chief Conservator of Forests, U. P., was set aside as appears from notification no 4418/XIV—486-50, read with 3130/XIV—486-50, dated 8th June, 1954 and G. O. no. 174-G/XII-C, dated 11th January, 1956 (annexures I and A respectively), but it was directed by the Government that the respondent be treated as having reverted to the Co-operative Department from February 24, 1954, and that disciplinary proceedings be taken against him *de novo* by placing him under suspension from the date of his reversion to the Co-operative Department. His period of probation was also extended up to 23rd February, 1954, i.e. the date of his discharge from the Forest Department. In accordance with the above direction of the Government, the Registrar, Co-operative Societies, U. P., placed Shri Lyall under suspension with effect from 24th February, 1954 and framed fresh charges against him on 28th April, 1956. Shri Lyall filed his written explanation to these fresh charges and desired to cross-examine the witnesses who were expected to depose against him. He also filed a list of defence

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witnesses. The Deputy Registrar, Co-operative Societies, Kanpur, was appointed to conduct the enquiry into the aforesaid charges against the respondent. There was some delay in the disposal of the charges because the evidence to support those charges was to come from the Forest Department, whereas the enquiry was being conducted by the Co-operative Department, and the Co-operative Department sought the assistance and co-operation of the Forest Department in the matter through the intervention of the Government.

While the correspondence was continuing on the subject between the two departments and the Government, the respondent filed a writ petition in this Court under Article 226 of the Constitution on 23rd December, 1957 in which he prayed that a direction, writ or order in the nature of the *certiorari* be issued against the Registrar, Co-operative Societies, cancelling his order of suspension as well as further proceedings taken thereafter against the appellant. He further prayed that a writ, direction or order in the nature of *mandamus* be issued against the Chief Conservator of Forest, U. P., requiring him to give him a posting in the U. P. Forest Service. In the alternative, he prayed for a suitable writ, direction or order against the Registrar, Co-operative Societies, U. P., Lucknow, and the Deputy Registrar, Co-operative Societies, U. P., Bareilly, and the State of U. P. requiring them to conduct a proper enquiry into the charges levelled against him in so far as they could be re-agitated against him.

The learned single Judge who heard the writ petition held that the order reverting the respondent to the post of Inspector of Co-operative Societies and the subsequent order of the Registrar, Co-operative Societies, suspending him from service was invalid. He further held that the disciplinary proceedings being

taken against the respondent, by the Registrar, Co-operative Societies, were without jurisdiction. In the result he quashed the order of reversion, the order of suspension, and the disciplinary proceedings which were being taken against the respondent by the Registrar, Co-operative Societies.

Aggrieved by the aforesaid judgment of the learned Single Judge, the Chief Conservator of Forest, U. P., the Registrar, Co-operative Societies, the Deputy Registrar, Co-operative Societies and the State of U. P., who were the opposite parties in the writ petition of the respondent, have filed a special appeal, out of which this reference has arisen.

The respondent's case was that on 28th April, 1956, when the Registrar, Co-operative Societies, framed charges against him in accordance with the directions of the Government, he (respondent) had ceased to be in the service of the Co-operative Department and that from 1st April, 1951, the date on which his period of probation expired, he was a confirmed Assistant Conservator of Forests under the Forest Department hence the action of the Registrar, Co-operative Societies, in suspending the respondent from service and conducting an enquiry into the charges against him, was without jurisdiction. On behalf of the appellants it was contended that the respondent had been confirmed as an Inspector of Co-operative Societies on 1st October, 1948, that his lien had only been suspended in that post since he was permitted to serve in the Forest Department and being still in service in that department, he was amenable to the jurisdiction of the Registrar, Co-operative Societies. It was further contended that as no orders confirming the respondent as an Assistant Conservator of Forests had been passed by a competent authority, he did not acquire the status of a confirmed servant in the Forest Department.

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Relying on rules 12A and relevant parts of rule 14 of the Financial Handbook, Volume II, quoted below,—

"12A. Unless in any case it be otherwise provided in these rules, a government servant on substantive appointment to any permanent post acquires a lien on that post and ceases to hold any lien previously acquired on any other post."

"14. (a) The lien of a government servant on a permanent post which he holds substantively shall be suspended if he is appointed in a substantive capacity—

(1) to a tenure post, or

(2) to a permanent post outside the cadre on which he is borne, or

(3) provisionally, to a post on which another government servant would hold a lien had his lien not been suspended under this rule."

and by reference to the facts of the case, the learned single Judge held,

(1) That the lien which the petitioner held on the post of the Inspector of Co-operative Societies had been suspended;

(2) That the post which the petitioner held in the Forest Service was a permanent post, and

(3) That his appointment thereto was in a substantive capacity.

He further held that because of the suspension of the petitioner's lien on the post of Inspector of Co-operative Societies, his appointment in the Forest Service was in a substantive capacity on a permanent post. In his opinion "once the lien of a government servant is suspended on any post, because he has been substantively appointed in another permanent post, the

concerned government servant does not possess any lien on his old post which is indeed suspended". Lastly, he was of opinion that "once a lien is suspended though it may not have terminated nevertheless for all practical purposes it does not exist". In view of the above reasoning, it appears the learned Judge was of opinion that the respondent's connections with the Co-operative Department, where he held a permanent post had completely ceased on the date when he was charge-sheeted by the Registrar, Co-operative Societies.

On the question whether the respondent acquired the status of a confirmed servant in the Forest Department on the expiry of the period of probation of two years on 1st April, 1951, or that his period of probation should be deemed to continue even after that in spite of the fact that his period of probation had not been extended by any order passed within two years from the date of his appointment in tht Forest Department, the learned single Judge held that there was never any order extending the period of probation and that because his probation came to an end on 31st March, 1951, he would no longer be on probation after that. Regarding the other part of this contention, the learned single Judge held that during the interval which elapses after the expiry of the period of probation and before any orders for his confirmation are passed, he would be deemed to be "a quasi-permanent servant" and that in such "a condition the government servant, though he may not be permanent in his post possesses has a claim to continue in his post which claim is often knows by the expression 'lien'."

In coming to these conclusions, the learned single Judge referred to the provisions of rules 14, 15 and 16 of the U. P. Forest Service Rules, 1952, which are analogous to some of the rules of the Deputy Inspector

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of Schools Service Rules, 1944, and also referred to two of his earlier decisions *Bipat Prasad Sonekar* v. *The State of Uttar Pradesh* (1), *S. N. Sagar* v. *State of Uttar Pradesh* (2). The case *Bipat Prasad Sonekar* v. *The State of Uttar Pradesh* (1) related to the Education Department and rule 14 of the U. P. Forest Service Rules is similar to rule 17 of the Deputy Inspector of Schools Service Rules of 1944 and likewise rule 16 of the U. P. Forest Service Rules, is identical to rule 19 of those rules. In this case the question for decision was whether after expiry of the period of probation originally fixed, was it open to the Government to extend the period of probation by an order passed subsequently. The learned single Judge held that the servant in that case would not be deemed to be on probation after the expiry of the period of probation and that the Government had no power under rule 17 of the Deputy Inspector of Schools Service Rules, 1944, to extend the period of probation retrospectively. The case of *S. N. Sagar* v. *The State of Uttar Pradesh* (2) involved the interpretation of rules 22 and 23 of the U. P. Civil Services (Executive Branch) Rules, 1941, and rule 55 of the Civil Services (Classification, Control and Appeal) Rules, which are identical to the relevant rules of the U. P. Forest Service Rules. There also the learned single Judge was called upon to decide whether the period of probation can be extended retrospectively after its expiry. The period of probation in that case was also of two years which expired and had not been extended within those two years. The learned single Judge held that the rule, no doubt, lays down that the period of probation shall be two years and it can be extended but the order granting extension must specify the date up to which it is done and that it should appear at any time during or at the end of the probation indicating that the officer

(1) 1959 A.L.J. 79. (2) I.L.R. [1959] 1 All. 226.

has not made sufficient use of the opportunities afforded to him during the period of probation. According to the learned Judge, the period of probation, which is a period of trial, is thus a fixed period and though it can be extended in appropriate cases, it has nevertheless to be a fixed period and not continue indefinitely.

On behalf of the respondent, reliance was also placed on a Bench decision of this Court reported in *State of U. P.* v. *Dr. Kanshi Ram Anand,* (1). In this case Dr. *Kanshi Ram Anand,* who held the degree of M. B., B. S., was appointed to the State Medical Service on probation for two years, which expired on the 19th June, 1951. No formal orders were passed confirming him on the post and he continued to serve on it till August, 1954. During the period of probation, he had appeared befor the State Medical Board and he was found fit for appointment in spite of the fact that he suffered from stammer. He was required to appear before the State Medical Board again on 3rd July, 1954, and on this occasion the Board considered him "to be completely and permanently incapacitated for further service on any account in consequence of impediment of speech and to have lost all earning capacity". As a consequence of this report, the State Government discharged Dr. *Kanshi Ram Anand* from service with effect from the date of the relief. After unsuccessfully agitating the matter before his department and then before the Government, the respondent preferred a writ petition which was allowed by a learned single Judge of this Court and the order of discharge was set aside. On appeal, the order passed by the learned single Judge was affirmed by a Bench. The leading judgment was delivered by MOOTHAM, C.J. Interpreting rules 18 clause (i), 19 and 20 of the

(1) A.I.R. 1958 All. 844.

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United Provinces Public Health Service Rules, quoted in that judgment and reproduced below—

"(i) Recruits directly appointed shall be on probation for two years and will draw a pay of Rs.200 per mensem during the first year and Rs.215 per mensem on completion of the first year of service. On confirmation they shall be placed at the Rs.230 stage of the time scale of pay for further entrants laid down in Rule 21(*a*). Temporary or officiating service shall count towards probation.

(ii) * * * * *

19. The services of a probationer may be dispensed with by the Government at any time during the period of probation or at its end. The Government may also extend the period of probation in the case of any particular member for any further period up to one year.

20. A probationer shall be confirmed in his appointment when—

(*a*) he has completed the prescribed period of probation and

(*b*) the Government are satisfied that (i) he is sufficiently acquainted with all local enactments relating to public health, municipal and district organization, the administrative work of local bodies, and the relations of those bodies to the various departments of the Government; (ii) he is otherwise fit for confirmation;

(*c*) all confirmations under this rule shall be notified in the *Government Gazette*."

the learned Chief Justice held that—

"a recruit directly appointed (such as was the respondent) is appointed to a permanent post on

probation. The period of probation is ordinarily two years but may in the case of any particular member—the use of the word 'member' in Rule 19 is significant—be extended for any further period up to one year, and during the period of probation the services of the member may be dispensed with at any time. There is no provision for the probationary period exceeding three years and in no case, in my opinion, can a member on probation after the expiry of that period or such reasonable time thereafter as is necessary for the Government to decide whether on a review of his work during the probationary period his services should be dispensed with."

"Rule 20 states the conditions subject to which a probationer shall be confirmed. It imposes a duty on the Government to confirm the probationer in the circumstances therein stated, and that duty is one which the Government has to perform if at all, at the expiration of the period of probation."

"In the present case the Government did not conform the respondent at the end of his period of probation. He admittedly was allowed to continue in Government service for three more years. In such circumstances it appears to me that there are only two possibilities, that respondent's further employment must be either permanent or temporary. I am disposed to think that the former view is the better, and that if the Government does not exercise its right under Rule 19 to dispense with a member of the service during or at the end of his period of probation, but retains him in its employment, it must be deemed to have confirmed him in his appointment. It is not however necessary for me to express a final opinion on this point

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for, whichever be the correct view, a second question arises."

The other learned Judge, who constituted the Bench, concurred with the result proposed by the learned Chief Justice, and did not express any opinion on the interpretation of the above rules. The State appeal was dismissed because of non-compliance with the requirements of Article 311 of the Constitution in discharging the respondent from service. On the question whether the respondent in that case acquired the status of a confirmed servant automatically on the expiry of the period of probation and that his probationary period did not continue thereafter, the learned Chief Justice also, as quoted above, did not express his final opinion because he himself observed "It is not however necessary for me to express a final opinion on this point for, whichever be the correct view, a second question arises", though he seemed inclined to hold that the probationary period did not extend beyond the date of its expiry.

Having considered the arguments addressed by the parties and the available case-law on the subject, we are of opinion that confirmation to a Government post occupied by a probationary servant is not a right which accrues to him automatically on the expiry of the period of probation. He acquires the status of a confirmed Government servant on that post only as a result of an affirmative order passed in that behalf by the competent authority. The period of probation of a Government servant whether prescribed by rules or by an order, is a period of trial which affords an opportunity to the authority empowered to confirm him, to observe the performance of the servant on the post occupied by him and to make up its mind on the expiry of the said period whether the servant concerned is fit to be confirmed on the post or not. The

competent authority may, if it feels satisfied earlier that the servant is qualified to be confirmed and also if the rules permit, confirm him on the post even before the expiry of the period of probation. It may also extend the period of probation (if the extension is permitted by the rules) before the expiry of the period of probation. It is, however, not bound by any rule to decide before the expiry of the period of probation whether to confirm him or watch his work and conduct for a further period and extend the period of probation. The very fact that Government servant is on probation for a certain period means that the confirming authority has a right to watch his work and conduct for the whole of the period of probation and then to decide whether to confirm him or to extend the period of probation in order to watch his work and conduct for a further period or to terminate his service. It is entitled to wait till the expiry of the whole of the period for watching his work and conduct to the fullest extent and then to consider whether he should be confirmed or not. It is entitled to receive reports about his work and conduct from officers immediately superior to him and to take a reasonable time to make up its mind. It is not bound by any rule to decide immediately, i.e. without the passage of any time, after the expiry of the period of probation, whether to confirm him or to terminate his service or to extend the period of probation. Some time must naturally be taken in deciding what to do, and since it has a right to use the whole of the period of probation for watching his work and conduct, it follows that some time must elapse before it passes an order confirming him or terminating his service or extending the period of probation. In other words, from the mere lapse of the period of probation it cannot be assumed that the servant has been confirmed, such an assumption would

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mean curtailment of the period of probation, which is not permitted. It is practically impossible to pass an order of termination of service or extending the period of probation the moment the prescribed period of probation expires, and unless it is passed before the expiry of the prescribed period of probation (which means that the prescribed period of probation is curtailed) it will be practically impossible to terminate his service or extend the period of probation. If within a reasonable time the authority does not pass an order confirming him or extending his period of probation or terminating his service it will still not lead to the assumption that he has been confirmed, his remedy would simply be to apply for a *mandamus* calling upon the authority to pass an appropriate order within a certain time. What is a reasonable period within which the authority must pass an order one way or another is a question of fact depending upon the circumstances and need not be considered here because the respondent never sought a *mandamus* calling upon the confirming authority to pass an order in respect of confirmation. If a Government servant cannot be presumed to have been confirmed the moment the period of his probation expires without an order extending it or terminating his service being passed he cannot be presumed (to have been confirmed) at any subsequent stage also without an express provision to that effect. In the absence of a provision in the contract or rules of service he cannot be presumed to have been confirmed after the lapse of any time since the expiry of the period of probation.

Confirmation does not depend upon mere passage of time: it depends upon the Government servant being found to be fit for confirmation. What is required is a finding, express or implied, that he is fit to be confirmed. If after the expiry of the period of probation

an order simply confirming him is passed it may be implied to contain a finding that he is found fit to be confirmed. From no other circumstance such a finding can be implied and without it no confirmation can come into existence. It cannot be disputed that mere expiry of the period of probation does not lead to the inference of fitness for confirmation; the confirming authority must actually judge him to be fit.

So far we have dealt with the general aspect. In this particular case there is one more reason for our rejecting the doctrine of automatic confirmation and it is that rule 16 of the U. P. Forest Service Rules requires certain conditions to be fulfilled before a person is confirmed on the post of Assistant Conservator of Forests. It reads as follows :

> "16(*a*) A person on probation shall not be confirmed in his appointment unless—
>
> (i) he has completed the prescribed period of probation ;
>
> (ii) he has passed all the tests prescribed in rule 15 or has been exempted from passing such tests ; and
>
> (iii) the Governor is satisfied that he is fit for confirmation in other respects.
>
> (*b*) If the period of probation of a person is extended on account of failure to pass the examination prescribed in rule 15 the confirmation shall take effect on passing the examination, from the first day of the month following that in which the examination is held."

Mere expiry of the period of probation is not enough for confirmation; the person must have passed all prescribed tests and he must have been found to be fit to the satisfaction of the Governor. The existence of

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these conditions is quite inconsistent with the doctrine of automatic confirmation.

In *State of Punjab* v. *S. Sukhbans Singh* (1) the respondent *Sukhbans Singh*, who was a permanent Tahsildar, was promoted to a post in the Punjab Provincial Civil Service and was appointed on probation for eighteen months on 31st May, 1945. He was reverted to his permanent post on the 20th May, 1952. No orders admittedly had been passed in this period either confirming him on the higher post or extending his period of probation. The respondent filed a writ petition under Article 226 of the Constitution and a learned single Judge of that Court granted a direction that the State of Punjab should forbear from putting into execution the order reverting him to his permanent post without complying with the provisions of Article 311 of the Constitution. On an appeal by the State of Punjab, a Bench of that Court repelled the respondent's contention "that as the petitioner was not removed from the higher service immediately on the completion of the probationary period of 18 months and as he was allowed to continue in his appointment several years thereafter without an express order extending the period of probation, it must be assumed that he was appointed substantively to the Provincial Civil Service on the conclusion of the period of probation". It was further found that there was no rule which enabled the court to hold that the probationary period had ripened into a permanent appointment by efflux of time. Their Lordships did not subscribe to the proposition that as soon as the servant became qualified for substantive appointment, he must be deemed to have been automatically confirmed. Lastly, their Lordships held that the respondent in that case "could not acquire the status of a permanent member of the

(1) A.I.R. 1957 Punj. 191.

service automatically and that he could have acquired this status only if the competent authority had chosen to perform a positive or an affirmative act".

In *R. Venkatapathy* v. *Deputy Inspector General of Police, Western Range, Coimbatore* (1), which was an appeal against an order passed by a learned single Judge dismissing the appellant's writ petition, a contention was advanced on behalf of the appellant that as soon as the period of probation came to an end, the appellant automatically became a full member of the service. The Bench consisting of P. V. RAJAMANNAR, C. J. and PANCHA PAKESA AYYAR, J. repelled this contention. Their Lordships held that it is one thing to say that the period of probation had come to an end on a particular day but it was an another thing to say that the period of probation in the case of Government servant was found satisfactory and he was admittedly full member of the service. In the opinion of their Lordships, before the latter could be done, there should have been a finding by the concerned superior officer that his probation has been found to be satisfactory. Proceeding further, their Lordships held—

> "Necessarily the determination of this question can only be taken up after the period of probation has come to an end. It is idle to contend that the superior officer has no right even to come to a conclusion whether the probation has been satisfactory and whether he is entitled to be admitted as a full member of the service."

With respect we find ourselves in complete agreement with the opinion expressed in the decisions of the Punjab High Court and the Madras High Court noted above and we are unable to agree with the opinion of the learned single Judge of our

(1) A.I.R. 1958 Mad. 216.

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court expressed in his two decisions that the Government cannot extend the period of probation retrospectively. Equally we do not agree with the learned single Judge that the Government servant at any stage acquires a status of a "quasi permanent" servant. He can be either a probationary servant or a confirmed servant if so made by the authority concerned. The status "quasi permanent" as described by the learned single Judge is, in our opinion, not envisaged by any rule, law or precedent.

We have already noticed that in the Bench decision reported in *State of U. P.* v. *Dr. Kanshi Ram Anand* (1) the learned Chief Justice did not give his final opinion on the question referred to us for answer and that the other learned Judge, who constituted the Bench, did not express himself at all on this aspect of the matter.

No statutory law, rule of the Forest Department or for the matter of that any rule of any other department, has been shown to us on behalf of the respondent to support the proposition that the probationary service of a Government servant ripens automatically into a permanent service only as a result of the expiry of the period of probation.

We have referred earlier to rule 16 of the U. P. Forest Service Rules requiring a person to pass all prescribed tests or being exempted from passing them before he is confirmed. Under rule 15, the respondent was required to pass a test in Hindi before he could be eligible for confirmation on his post. Admittedly, he has failed to pass the required Hindi test. It is not suggested on his behalf that he had been exempted from passing that test. On account of his failure to fulfil this condition, if

(1) A.I.R. 1958 All. 844.

for no other reason, he was not eligible for confirmation as an Assistant Conservator of Forests even if the period of probation had expired without any order extending it or terminating his service.

On behalf of the respondent, it was argued that his services with the Co-operative Department should be deemed to have terminated because in April, 1952, when he was asked to revert to that department, he intimated to the Government through the Forest Department that he would not like to revert to his post in the Co-operative Department. We do not see any force in this argument. As noted above, his lien in the Co-operative Department was only under suspension. It had never been terminated. In our opinion his services with the Co-operative Department did not come to an end merely on the expression of the respondent's desire not to return to his post in that department because he was at that time serving in the Forest Department. In order to hold that the respondent's service with the Co-operative Department should have been deemed to have ceased, his reply that he would not like to return to that department should have been followed up by an order of the competent authority of the Co-operative Department terminating the respondent's lien in that department. No such order was passed. Mere intimation in that behalf on the part of the respondent could not have the effect of terminating his service in the Co-operative Department where he held a permanent post and would be deemed to be in the service of the Co-operative Department when charge-sheeted in 1956. It may very reasonably have been interpreted by the Co-operative Department to mean that he did not want to revert to the department at that time but would like to continue in the Forest Department

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the Co-operative Department to be terminated till such confirmation.

As a result of the discussion and findings given above, our answer to the question referred to us is that a Government servant on probation is not to be deemed to be confirmed on the expiry of the period of his probation, if no orders confirming him in his substantive post or extending his period of probation are passed by the competent authority and that the orders confirming the officer, terminating his appointment, or extending the period of probation may be passed even after the expiry of the period of probation provided the decision is based on the work and conduct during the period of probation.

Reference answered.

SUPREME COURT

APPELLATE CIVIL

Before the Hon'ble Mr. Jusitce Gajendragadkar, the Hon'ble Mr. Justice Sarkar, the Hon'ble Mr. Justice Wanchoo, the Hon'ble Mr. Justice Das Gupta and the Hon'ble Mr. Justice Ayyangar.

THE SWADESHI COTTON MILLS CO. LIMITED (APPELLANT).

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v.

THE STATE INDUSTRIAL TRIBUNAL, U. P. AND OTHERS (RESPONDENTS).

[ON APPEAL FROM THE HIGH COURT AT ALLAHABAD.]

Industrial dispute in U. P.—*Power of State Government regarding conciliation or adjudication of industrial disputes—Constitutionality of.*

State Government setting up Conciliation boards and industrial tribunals without any recital in the order as to its satisfaction about the existence of condition precedent of public safety, etc—Validity of the order—U. P. Industrial Disputes Act (No XXVIII of 1947) s. 8, cl. (c) (d) and (g).

S. 8 of the U. P. Industrial Disputes Act empowering the State Government, *inter alia*, to appoint industrial courts, to refer industrial disputes for conciliation or adjudication and to pass incidental and supplementary orders in that behalf if it is, in its opinion, necessary or expedient in the interest of public safety, convenience or order, etc. is constitutional and does not suffer from the vice of excessive delegation. All that has been left to the Government by that section is to carry out by subordinate rules or orders the policy and purposes of the Legislature defined in the Act within the prescribed limits and there is, therefore, no delegation of essential legislative function to the State Government.

The orders of the State Government under s. 8 of the Act setting up conciliation boards and industrial tribunals for settlement of industrial disputes are valid and effective although they did not disclose therein that the State Government had satisfied itself as to the necessity or expediency of the orders in the interest of public safety, convenience, etc.

Where certain conditions precedent have to be established before a subordinate authority can pass an order (be it executive or of the character of subordinate legislation) it is not necessary that the satisfaction of those conditions must be recited in the order itself unless the Statute requires it, though it

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is most desirable that it should be so, for in that case the presumption that conditions were satisfied would immediately arise and the burden would be thrown on the person challenging the fact of satisfaction to show that what is recited is not correct. But even where the recital is not there on the face of the order, the order will not become illegal *ab initio* and only a further burden is thrown on the authority passing the order to satisfy the court by other means (in this case through an affidavit filed in appeal before the Supreme Court) that the conditions precedent were complied with That would cure the lefect and render the order valid and effective.

Case-law discussed.

Civil Appeal No. 327 of 1958 from the judgment and decree, dated the 6th March, 1958, of the High Court at Allahabad in Civil Misc Writ Petition No. 967 of 1953.

Civil Appeals connected with nos. 363 to 369 of 1958 R. J. Holley and others *v.* State of Uttar Pradesh and others from the judgments and decrees dated the 1st February, 1957, of the Allahabad High Court, in Civil Misc. Writ Petitions nos. 51 (Lucknow Bench), 523, 524, 607, 632, 633 and 634 of 1955.

The facts appear in the judgment.

G. S. Pathak, Senior Advocate (*S. P. Varma*, Advocate, with him) for the appellant (In Civil Appeal No. 327 of 1958).

C. B. Agarwala, Senior Advocate (*G. C. Mathur* and *C. P. Lal*, Advocates with him) for Respondents nos. 2 to 4 (in Civil Appeal No. 327 of 1958).

J. P. Goyal, Advocate for Respondent No. 5, *H. N. Sanyal*, Additional Solicitor-General for India (*H. S. Brar*, Advocate and M/s. *S. N. Andley*, *J. B. Dadachanji*, *Rameshwar Nath* and *P. L. Vohra*, Advocates of M/s. Rajinder Narain and Co., with him) for the appellants (in Civil Appeals nos. 363 to 369 of 1958).

C. B. Agarwala, Senior Advocate (*C. P. Lal*, Advocate, with him) for the Respondent No. 1 (in Civil Appeals nos. 363 to 369 of 1958).

Bhawani Lal and *Dharam Bhushan*, Advocates, for Respondent no. 4 (in Civil Appeal no. 369 of 1958) *J. P. Goyal*, Advocate, for Respondent no. 4 in Civil Appeals nos. 366 and 368 of 1958).

S. C. Das, in person for Respondent no. 4 (in Civil Appeal no. 367 of 1958).

The following judgment of the court was delivered by—

WANCHOO, J.—This group of appeals raises a question about the constitutionality of s. 3 of the United Provinces Industrial Disputes Act No. XXVIII of 1947 (hereinafter referred to as the Act) and the validity of two general orders passed thereunder on March 15, 1951. The appellants are certain industrial concerns. There were disputes between them and their workmen which were referred for adjudication to industrial tribunals alleged to have been set up under the general orders of March 15, 1951. Certain awards were passed which were taken in appeal by the present appellants to the Labour Appellate Tribunal and they failed there also. They then filed petitions under Art. 226 of the Constitution in the Allahabad High Court challenging the constitutionality of s. 3 of the Act and the validity of the two general orders passed on March 15, 1951, by which industrial tribunals were set up. The High Court held that s 3 of the Act was constitutional. It however held that the two general orders, dated March 15, 1951, were invalid; but it went on to hold that orders of reference passed in these cases were special orders as envisaged under s. 3 of the Act and were therefore not invalid; in consequence it dismissed the petitions. The appellants then applied for and obtained certificates for leave to appeal; and that is how the matter has come up before us.

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It is unnecessary to set out the facts further in respect of these appeals, as the only points argued before us are about the constitutionality of s. 3 and the validity of the general orders of 1951 and also of the references made in these cases. It is not disputed that if the appellants fail on these points their appeals in this Court must fail. We shall, therefore, first take up the question of the constitutionality of s. 3 of the Act.

The relevant provision of s. 3 in 1951 with which we are concerned was in these terms—

> "If, in the opinion of the State Government it is necessary or expedient so to do for securing the public safety or convenience, or the maintenance of public order or supplies and services essential to the life of the community, or for maintaining employment, it may, by general or special order, make provision—
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> * * *
>
> (*c*) for appointing industrial courts;
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> (*d*) for referring any industrial dispute for conciliation or adjudication in the manner provided in the order;
>
> * * *
>
> (*g*) for any incidental or supplementary matters which appear to the State Government necessary or expedient for the purposes of the order:
>
> * * *

The main contention of the appellants is that s. 3 is unconstitutional as it delegates essential legislative function to the Government so far as cls. (*c*), (*d*) and (*g*) are concerned. Reliance in this connection is placed on the following observations of KANIA, C. J. in *In re The Delhi Laws Act*, 1912 (1), where he was considering the meaning of the word "delegation":

(1) (1951) S. C. R. 747, 767.

"When a legislative body passes an Act it has exercised its legislative function. The essentials of such function are the determination of the legislative policy and its formulation as a rule of conduct. These essentials are the characteristics of a legislature by itself. . . . Those essentials are preserved, when the legislature specifies the basic conclusions of fact, upon ascertainment of which, from relevant data, by a designated administrative agency, it ordains that its statutory command is to be effective. The legislature having thus made its laws, it is clear that every detail for working it out and for carrying the enactments into operation and effect may be done by the legislature or may be left to another subordinate agency or to some executive officer. While this also is sometimes described as a delegation of legislative powers, in essence it is different from delegation of legislative power which means a determination of the legislative policy and formulation of the same as a rule of conduct."

To the same effect were the observations of MUKHERJEA, J. in that case at p. 982:

"The essential legislative function consists in the determination or choosing of the legislative policy and of formally enacting that policy into a binding rule of conduct. It is open to the legislature to formulate the policy as broadly and with as little or as much details as it thinks proper and it may delegate the rest of the legislative work to a subordinate authority who will work out the details within the framework of that policy. 'So long as a policy is laid down and a standard established by statute no constitutional delegation of legislative power is involved in leaving to selected instrumentalities the making of subordinate rules within

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prescribed limits and the determination of facts to which the legislation is to apply'."

What we have to see therefore is whether the legislature in this case performed its essential legislative function of determining and choosing the legislative policy and of formally enacting that policy into a binding rule of conduct. It was open to the legislature to formulate that policy as broadly and with as little or as much details as it thought proper. Thereafter once a policy is laid down and a standard established by statute, there is no question of delegation of legislative power and all that remains is the making of subordinate rules within prescribed limits which may be left to selected instrumentalities. If therefore the legislature in enacting s. 3 has chosen the legislative policy and has formally enacted that policy into a binding rule of conduct, it could leave the rest of the details to Government to prescribe by means of subordinate rules within prescribed limits. Now s. 3 lays down under what conditions it would be open to Government to act under that section; it also lays down that the Government may act by passing general or special order, once those conditions are fulfilled; it also provides what will be contained in the general or special order of Government. The power given to Government is *inter alia* to appoint industrial courts, to refer any industrial dispute for conciliation or adjudication in the manner provided in the order, and to make any incidental or supplementary provision which may be necessary or expedient for the purposes of the order. Thus the legislature has indicated its policy and has made it a binding rule of conduct. It has also indicated when the Government shall act under s. 3 and how it shall act. It has further indicated what it shall do when it acts under s. 3. In these circumstances we are of the opinion that it cannot be said that the delegation made by s. 3 is excessive and

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goes beyond permissible limits. The order to be passed by the Government under s. 3 would provide, *inter alia*, for appointment of industrial courts, for referring any industrial dispute for conciliation or adjudication, and for incidental or supplementary matters which may be necessary or expedient. The Government will have to act within those prescribed limits when it passes an order under s. 3 which will have the force of subordinate rules. What has been urged on behalf of the appellants is that the section does not indicate what powers the industrial courts will have, what will be the qualifications of persons constituting such courts and where they will sit; and it is urged that these are essential matters which the legislature should have provided for itself. Reference in this connection was made to the observations of the Privy Council in *Queen* v. *Burah* (1) which was a case of conditional legislation. The Privy Council observed there that the proper legislature having exercised its judgment as to place, person, laws and powers and the result of that judgment having been conditional legislation as to all these things, the legislation would be absolute as soon as the conditions are fufilled. These observations have in our opinion nothing to do with such matters of detail as the place where a court or tribunal will sit or the qualifications of persons constituting the tribunal; they refer to more fundamental matters when the words "place" and "person" are used therein. The place there must mean the area to which the legislation would apply; and so far as that is concerned, the legislature has determined the area in this case to which s. 3 will apply, namely, the whole of the State of Uttar Pradesh. Similarly, the word "person" used there refers to persons to whom legislation will apply and that has also been determined by the legislature in this case, namely, it will apply to

(1) (1878) L. R. 5 I. A. 178.

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employers and employees of industrial concerns. We have already said that the conditions under which the order will be passed have also been set out in the opening part of s. 3 and how the Government will act is also set out, namely, by referring any industrial dispute that may arise for conciliation or adjudication As to the power of the industrial court that in our opinion is also provided by s. 3, namely, that an industrial court will adjudicate on the industrial dispute referred to it. Therefore all that was left to the Government to provide was to set up machinery by means of a general order which has the force of subordinate rules to carry out that legislative policy which has been enacted in broad details in s. 3 and has been formally enacted into a binding rule of conduct. We are therefore of opinion that s. 3 is not unconstitutional in any manner, for there is no delegation of essentials of legislative function thereunder. All that has been left to the Government by that section is to provide by subordinate rules for carrying out the purpose of the legislation. We must, therefore, reject the contention that s. 3 is unconstitutional on the ground that it suffers from the vice of excessive delegation.

This brings us to the validity of the general order no. 615 of March 15, 1951, passed under s. 3. The preamble to that order was in these terms:

> "In exercise of the powers conferred by clauses (*b*), (*c*), (*d*) and (*g*) of section 3 and section 8 of the U. P. Industrial Disputes Act, 1947 (U. P Act no. XXVIII of 1947), and in supersession of Government Order no. 781(L)/XVIII, dated March 10, 1948, the Governor is pleased to make the following order, and to direct, with reference to section 19 of the said Act, that notice of this Order be given by publication in the official *Gazette*."

Then follows the order setting up conciliation boards for the purpose of conciliation and industrial tribunals for the purpose of adjudication. The main contention on behalf of the appellants is that s. 3 prescribes certain conditions precedent before an order could be passed thereunder and those conditions precedent must be recited in the order in order that it may be valid exercise of the power conferred by s. 3. Now there is no doubt that s. 3 gives power to the State Government to make certain provisions by general or special order, if, in its opinion, it is necessary or expedient so to do for securing public safety or convenience, or the maintenance of public order or supplies and services essential to the life of the community or for maintaining employment. The forming of such opinion is a condition precedent to the making of the order. The preamble to the second order also does not contain a recital that the State Government had formed such opinion before it made the order. It is therefore contended on behalf of the appellants that the orders were bad as the condition precedent for their formulation was not recited in the orders themselves. At a later stage the appellants also contended that in any case the orders were bad because as a fact they were passed without any satisfaction of the State Government as required under s. 3, though no affidavit was filed by the appellants in this behalf in support of this averment. Unfortunately, the State also filed no affidavit to show that the conditions precedent provided in s. 3 had been complied with, even though there was no recital thereof on the face of the order. We should have expected that even though the appellants did not file an affidavit in support of their case on this aspect of the matter, the State would as a matter of precaution have filed an affidavit to indicate whether the conditions precedent set out in s. 3 had been complied with, considering that it was a general order which

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was being attacked under which a large number of adjudications must have taken place. The High Court has commented on this aspect of the matter and has said that the State Government did not file any affidavit in this connection to show that as a matter of fact the State Government was satisfied as required by s. 3 even though there was no recital of that satisfaction in the order itself. Taking into account, however, the importance of the matter, particularly as it must affect a large number of adjudications affecting a large number of employers and workmen, we asked the State Government if it desired to file an affidavit before us even at this stage. Thereupon the State Government filed an affidavit sworn by the Secretary to Government, Labour Department. The affidavit says that the drafts of G. O. no. 615 and the consequential order G. O. no. 671 passed on March 15, 1951, were put up before the then Labour Minister. The said notifications were issued only after all the aspects of the matter were fully considered by the State Government and it had satisfied itself that it was necessary and expedient to issue the same for the purpose of securing public convenience, and maintenance of public order and supplies and services essential to the community and for the maintenance of employment. We accept this affidavit and it follows therefore that the satisfaction required as a condition precedent for the issue of an order under s. 3 of the Act was in fact there before the order no. 615 was passed on March 15, 1951, followed by the consequential order no. 671 of the same date. In view of this the only question that we have to consider is whether it is necessary that the satisfaction should be recited in the order itself and whether in the absence of such recital an order of this nature would be bad.

The first contention of Shri *Pathak*, who appears for one of the appellants, is that where a condition pre-

cedent is laid down for a statutory power being exercised it must be fulfilled before a subordinate authority can exercise such delegated power. As to this contention there can be no dispute. Further, according to Shri *Pathak*, there must be a recital in the order that the condition is fulfilled before the subordinate authority acts in the exercise of such delegated power. If there is no such recital in the instrument by which the delegated power is exercised, the defect cannot be cured by an affidavit filed in the proceedings and the order would be bad *ab initio*. It is urged that where subordinate rules of this nature have to be made and they affect the general public or a section thereof, conditions precedent to the exercise of the power must be recited when the power is exercised in order that the public may know that the rules are legal and framed after satisfying the conditions necessary for the purpose. Moreover, some of the subordinate rules may have to be enforced by courts and tribunals and it is necessary that courts and tribunals should also know by the presence of the recital in the order that the rules are legal and binding and have been framed after the condition precedent had been satisfied. In particular, it is urged that where the rules are of a general nature and are subordinate legislation the satisfaction of the condition precedent becomes a part of the legislative process so far as the subordinate authority is concerned and the defect in legislative process cannot be remedied later by affidavit.

Shri *C. B. Aggarwala* on the other hand contends that where a statute gives power to make an order subject to certain conditions then unless the statute requires the conditions to be set out in the order it is not necessary that the conditions should appear on the face of the order and in such a case it should be presumed that the

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condition was satisfied unless the contrary is established. He drew a distinction between those cases where the condition precedent is the subjective opinion of the subordinate authority and those where the statute requires a hearing and a finding In the former case he contends that the presumption should be in favour of the opinion having been formed before the order was passed though in the latter case it may be that the order should show that there was a hearing and a finding.

The power to pass an order under s. 3 arises as soon as the necessary opinion required thereunder is formed. This opinion is naturally formed before the order is made. If therefore such an opinion was formed and an order was passed thereafter, the subsequent order would be a valid exercise of the power conferred by the section The fact that in the notification which is made thereafter to publish the order, the formation of the opinion is not recited will not take away the power to make the order which had already arisen and led to the making of the order. The validity of the order therefore does not depend upon the recital of the formation of the opinion in the order but upon the actual formation of the opinion and the making of the order in consequence. It would therefore follow that if by inadvertence or otherwise the recital of the formation of the opinion is not mentioned in the preamble to the order the defect can be remedied by showing by other evidence in proceedings where challenge is made to the validity of the order, that in fact the order was made after such opinion had been formed and was thus a valid exercise of the power conferred by the law. The only exception to this course would be where the statute requires that there should be a recital in the order itself before it can be validly made.

There is no doubt that where a statute requires that certain delegated power may be exercised on fulfilment of certain conditions precedent, it is most desirable that the exercise should be prefaced with a recital showing that the condition had been fulfilled. But it has been held in a number of cases dealing with executive orders that even if there is some lacuna of this kind, the order does not become *ab initio* invalid and the defect can be made good by filing an affidavit later on to show that the condition precedent was satisfied. In *The State of Bombay* v. *Purushottam Jog Naik* (1), which was a case relating to preventive detention it was held by this Court that even if the order was defective in form it was open to the State Government to prove by other means that it was validly made. In *Biswabhusan Naick* v. *The State of Orissa* (2) which was a case relating to sanction under the Prevention of Corruption Act No. II of 1947, this Court held that "it is desirable to state the facts on the face of sanction, because when the facts are not set out in the sanction, proof has to be given *aliunde* that sanction was given in respect of the facts constituting the offence charged; but an omission to set out the facts in the sanction is not fatal so long as the facts can be and are proved in some other way." In a later case in *The State of Bombay* v. *Bhanji Munji* (3) which was a case of requisition under the Bombay Land Requisition Act, this Court held that it was not necessary to set out the purpose of the requisition in the order; the desirability of such a course was obvious because when it was not done proof of the purpose must be given in other ways. But in itself an omission to set out the purpose in the order was not fatal so long as the facts were established to the satisfaction of the Court in some other way.

We see no difficulty in following this principle in the case of those orders also which are in the nature of sub-

(1) (1952) S. C. R. 674. (2) (1955) 1 S. C. R. 92.
(3) (1955) 1 S. C. R. 777.

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ordinate legislation. Whether orders are executive or in the nature of subordinate legislation their validity depends on certain conditions precedent being satisfied. If those conditions precedent are not recited on the face of the order and the fulfilment of the conditions precedent can be established to the satisfaction of the court in the case of executive orders we do not see why that cannot be made good in the same way in the case of orders in the nature of subordinate legislation. We cannot accept the extreme argument of Shri Aggarwala that the mere fact that the order has been passed is sufficient to raise the presumption that conditions precedent have been satisfied, even though there is no recital in the order to that effect. Such a presumption in our opinion can only be raised when there is a recital in the order to that effect. In the absence of such recital if the order is challenged on the ground that in fact there was no satisfaction, the authority passing the order will have to satisfy the Court by other means that the conditions precedent were satisfied before the order was passed. We are equally not impressed by Shri *Pathak's* argument that if the recital is not there, the public or courts and tribunals will not know that the order was validity passed and therefore it is not necessary that there must be a recital on the face of the order in such a case before it can be held to be legal. The presumption as to the regularity of public acts would apply in such a case; but as soon as the order is challenged and it is said that it was passed without the conditions precedent being satisfied the burden would be on the authority to satisfy by other means (in the absence of recital in the order itself) that the conditions precedent had been complied with. The difference between a case where a general order contains a recital on the face of it and one where it does not contain such a recital is that in the latter case the burden is thrown on the authority making the order to satisfy

the Court by other means that the conditions precedent were fulfilled, but in the former case the Court will presume the regularity of the order including the fulfilment of the conditions precedent; and then it will be for the party challenging the legality of the order to show that the recital was not correct and that the conditions precedent were not in fact complied with by the authority: (*see* the observations of SPENS, C. J. in *King Emperor* v. *Sibnath Banerjee* (1) which were approved by the Privy Council in *King Emperor* v. *Sibnath Banerjee* (2) Nor are we impressed with the contention of Shri Pathak that conditions become a part of legislative process and therefore where they are not complied with the subordinate legislation is illegal and the defect cannot be cured by an affidavit later. It is true that such power may have to be exercised subject to certain conditions precedent but that does not assimilate the action of the subordinate executive authority to something like a legislative procedure, which must be followed before a bill becomes a law. Our conclusion, therefore, is that where certain conditions precedent have to be satisfied before a subordinate authority can pass an order (be it executive or of the character of subordinate legislation), it is not necessary that the satisfaction of those conditions must be recited in the order itself, unless the statute requires it, though, as we have already remarked, it is most desirable that it should be so, for in that case the presumption that the conditions were satisfied would immediately arise and burden would be thrown on the person challenging the fact of satisfaction to show that what is recited is not correct. But even where the recital is not there on the face of the order, the order will not become illegal *ab initio* and only a further burden is thrown on the authority passing the order to satisfy the court by other means that the con-

(1) (1944) F. C. R. 1, 42. (2) (1945) F. C. R. 195, 216-7.

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ditions precedent were complied with. In the present case this has been done by the filing of an affidavit before us. We are, therefore, of opinion that the defect in the two orders of March 15, 1951, has been cured and it is clear that they were passed after the State Government was satisfied as required under s. 3 of the Act. Therefore Government Orders nos. 615 and 671 of March 15, 1951, with which we are concerned in the present appeals are valid under s. 3 of the Act.

It remains to consider certain cases cited by Shri *Pathak* in support of his conteniton. The first case to which reference may be made is *Wichita Railroad and Light Company* v. *Public Utilities Commission of the State of Kansas* (1). That was a case of a Commission which had to give a hearing and a finding that they were unreasonable before contract rates with a public utility company could be changed. After referring to s. 19 of the Act under consideration, the U. S. Supreme Court held that "a valid order of the Commission under the act must contain a finding of fact after hearing and investigation, upon which the order is founded, and that, for lack of such a finding, the order in this case was void." It rejected the argument that the lack of express finding might be supplied by implication and by reference to the averments of the petition invoking the action of the Commission and rested its decision on the principle that an express finding of unreasonableness by the Commission was indispensable under the statutes of the State. This case in our opinion is based on the provision of the statute concerned which required such a finding to be stated in the order and is no authority for the proposition that an express recital is necessary in the order in every case before a delegate can exercise the power delegated to it.

(1) (1922) 67 L. Ed. 124

The next case is *Herbert Mahler* v. *Howard Eby* (1). That was a case dealing with deportation of aliens. The statute provided for deportation if the Secretary (Labour) after hearing finds that such aliens were undesirable residents of United States. But the Secretary made no express finding so far as the warrant for deportation disclosed it. Nor was the defect in the warrant of deportation supplied before the Court. The Court held that the finding was made a condition precedent to deportation and it was essential that where an executive is exercising delegated legislative power he should substantially comply with all the statutory requirements in its exercise, and that, if his making a finding is a condition precedent to this act, the fulfilment of that condition should appear in the record of the act, and reliance was placed on the case of *Wichita Railroad and Light Company* v. *Public Utilities Commission* (2). This again was a case of a hearing and a finding required by the statute to be stated in the order and must therefore be distinguished from a case of the nature before us. It may however be added that the court did not discharge the deportees and gave a reasonable time to the Secretary Labour to correct and perfect his finding on the evidence produced at the original hearing or to initiate another proceeding against them.

The last case is *Panama Refining Company* v *A. D. Ryan* (3) In that case s 9 (c) of the National Industrial Recovery Act of 1933 was itself struck down on the ground of excessive delegation, though it was further held that the executive order contained no finding and no statement of the grounds of the President's action in enacting the prohibition. This case in our opinion is not in point so far as the matter before us is concerned, for there the section itself was struck down and

(1) (1924) 68 L. Ed. 549. (2) (1922) 67 Ed. 124.
(3) (1935) 79 L. Ed. 446.

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in consequence the executive order passed thereunder was bound to fall.

We are therefore of opinion that s. 3 of the Act is constitutional so far as cls. (*c*), (*d*) and (*g*) are concerned and orders nos. 615 and 671 passed on March 15, 1951 are legal and valid. In the circumstances it is not necessary to consider whether the High Court was right in holding that the orders of references in these cases were special orders under s. 3 and the references under those orders were therefore valid. In this view of the matter, the appeals fail and are hereby dismissed. In the circumstances we pass no order as to costs.

Appeal dismissed

SUPREME COURT

APPELLATE CIVIL

Before the Hon'ble Mr. Justice Das, the Hon'ble Mr. Justice Hidayatullah, the Hon'ble Mr. Justice Das Gupta, the Hon'ble Mr. Justice Shah and the Hon'ble Mr. Justice Ayyangar.

JAGANNATH PRASAD SHARMA (APPELLANT).

1961 March, 6

v.

STATE OF UTTAR PRADESH AND OTHERS (RESPONDENTS).

[*On appeal from the High Court at Allanabad*]

Dismissal from service *of a Police Officer of subordinate rank by the Governor—Whether competent—Charge of immorality, corruption and gross dereliction of duty—Proceedings under Tribunal Rules—Whether discriminatory and void—Indian Police Act,* 1861, *s.* 7—*U. P. Disciplinary (Administrative Tribunal) Rules,* 1947, *rr.* 4(1) 8 *and* 10—*U. P. Police Regulations, Reg.* 490—*Constitution of India,* 1950, *Arts.* 14 *and* 310.

Held, (unanimously) that the power to dismiss, suspend or reduce a police officer of subordinate rank vested under s. 7 of the Police Act in the Inspector General of Police and other subordinate officers is not exclusive but subject and in addition to the provisions in the Constitution under which all civil servants (including under the present Constitution those in the Police force) in a State hold their office at the pleasure of the Governor, and are, as such, liable to removal or dismissal by him. There is, therefore, no substance in the plea that the Governor has no power to dismiss such officers from service.

(Per Majority; DAS GUPTA, J. *contra*)—In respect of any of the charges (viz. immorality, corruption and gross dereliction of duty) enumerated in r. 4(1), a police officer could, it is true, be proceeded against either under the U. P. Disciplinary Proceedings (Administrative Tribunal) Rules or the U. P. Police Regulations according to the choice of the authorities. The procedure laid down in the two are, however, substantially the same and, therefore, the continuance of an enquiry after the Constitution under the Tribunal Rules cannot be attacked as violative of Art. 14 of the Constitution. The fact that the order

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is made appealable whereas that of the Governor under the Tribunal Rules is not made appealable cannot be said to offend the guarantee of equal protection since in either case the final order rests with the Governor who has to decide the matter himself. Rule 10 of the Tribunal Rules in so far as it obliges the Governor to accept and pass the order of punishment in terms recommended by the Tribunal may, in view of the absence of such obligation on the corresponding authority under the Police Regulation, be regarded as inconsistent with the Constitution, but the partial invalidity of this rule does not, being severable, affect the remaining rules.

(*Per* DAS GUPTA, J.)—The Tribunal Rules in so far as they do not provide for any appeal against the decision of the Governor, are in view of the right of appeal provided for under the Police Regulation, amount to an unequal treatment and are, therefore, void to that extent. It is difficult to agree that the right of appeal is a right without substance. The contrary view misses the realities of the position and is really an attempt to slur over the difficulty.

State of Orissa v. *Dhirendra Nath Das* (1) distinguished by the majority and applied by DAS GUPTA, J.

Civil Appeal no. 490 of 1957, from the judgment and decree, dated the 22nd March 1954 of the Allahabad High Court in Civil Misc. Writ No. 7854 of 1951.

The facts appear in the judgment of SHAH, J.

G. S. Pathak, Senior Advocate (*M/s S. N. Andley, J. B. Dadachanji, Rameshwar Nath* and *P. L. Vohra*, Advocates, of M/s Rajinder Narain and Co., with him) for the appellant.

C. B. Agarwala, Senior Advocate (*G. C. Mathur* and *C. P. Lal*, Advocates, with him) for the Respondents nos. 1 and 3.

The following judgments of the Court were delivered by—

SHAH, J.—In 1931, the appellant was admitted to the police force of the United Provinces and was appointed a Sub-Inspector of Police. He was later promoted to the rank of Inspector, and in 1946 was transferred to the Anticorruption Department. In 1947, he was appointed, while retaining his substantive rank of Inspector, to

(1) Civil Appeal no. 103 of 1959 decided by the Supreme Court on 18th August, 1960.

the officiating rank of Deputy Superintendent of Police. Shortly thereafter, complaints were received by the Chief Minister and Inspector-General of Police, U. P., charging the appellant with immorality, corruption and gross dereliction of duty. In a preliminary confidential enquiry, the Inspector-General of Police came to the conclusion that "a prima facie case" was made out against the appellant. He then directed that a formal enquiry be held against the appellant and passed orders reverting the appellant to his substantive rank of Inspector and placing him under suspension. An enquiry was held into the conduct of the appellant by the Superintendent of Police, Anti-corruption Department. The report of the Superintendent of Police was forwarded to the Government of U. P., and the Governor acting under r. 4 of the Uttar Pradesh Disciplinary Proceedings (Administrative Tribunal) Rules, 1947—hereinafter called the Tribunal Rules—referred the case for enquiry to a Tribunal appointed under r. 3 of the Tribunal Rules on charges of corruption, personal immorality and failure to discharge duties properly. The tribunal framed three charges against the appellant, and after a detailed survey of the evidence recommended on February 4, 1950, that the appellant be dismissed from service. The Governor then served a notice requiring the appellant to show cause why he should not be dismissed from service and after considering the explanation submitted by the appellant, the Governor ordered that the appellant be dismissed with effect from December 5, 1950. The appellant challenged this order by a petition instituted in the High Court of Judicature at Allahabad under Art. 226 of the Constitution for a writ of *certiorari* quashing the proceedings of the Tribunal and for a writ of *mandamus* directing the State of Uttar Pradesh to hold an enquiry under s. 55 of the Civil Services (Classification, Control and Appeal) Rules.

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In support of his appeal against the order of the High Court dismissing his petition, the appellant has raised three contentions:

(1) that the order dismissing the appellant from the police force was unauthorised, because the Governor had no power under s. 7 of the Police Act and the regulations framed thereunder to pass that order;

(2) that even if the Governor was invested with power to dismiss a police officer, out of two alternative modes of enquiry, a mode prejudicial to the appellant having been adopted, the proceedings of the Tribunal which enquired into the charges against him were void, as the equal protection clause of the Constitution was violated; and

(3) that the proceedings of the Tribunal were vitiated because of patent irregularities which resulted in an erroneous decision as to the guilt of the appellant.

To appreciate the first two contentions, it is necessary briefly to set out the relevant provisions of the laws procedural and substantive in force, having a bearing on the tenure of service of members of the police force in the State of Uttar Pradesh.

The appellant was admitted to the police force constituted under Act V of 1861. By s. 3 of that Act, superintendence throughout a general police-district vests in and is exercised by the State Government to which such district is subordinate and except as authorised by the Act, no person, officer or court may be empowered by the State Government to supersede or control any police functionary. By s. 4 the administration of the police throughout a general police-district is vested in the Inspector-General of Police. By s. 7, it is provided that subject to the provisions of

Art. 311 of the Constitution and to such rules as the State Government may from time to time make under the Act, the Inspector-General, Deputy Inspectors-General, Assistant Inspectors-General and District Superintendents of Police may at any time dismiss, suspend or reduce any police officer of the subordinate rank whom they shall think remiss or negligent in the discharge of his duty, or unfit for the same, or may award any one or more of the punishments (set out therein) to any police officer of the subordinate rank who discharges his duty in a careless or negligent manner or who by any act of his own renders himself unfit for the discharge thereof.

Section 46, sub-s. (2) authorises the State Government to make rules for giving effect to the provisions of the Act, and also to amend, add to or cancel the rules framed. The Government of Uttar Pradesh has framed rules called the Police Regulations under the Indian Police Act. Chapter 32 containing regulations 477 to 507 deals with departmental punishment and criminal prosecution of police officers and Chapter 38 containing regulations 508 to 516 deals with appeals, revisions, petitions, etc. By regulation 477, it is provided that no officer appointed under s. 2 of the Police Act shall be punished by executive order otherwise than in the manner provided in the chapter. Regulation 478-A provides that the punishment of dismissal or removal from the force or reduction as defined in regulation 482 may be awarded only after departmental proceedings. By regulation 479, cl. (*a*), "full power" is reserved to the Governor to punish all police officers, and by cl. (*b*), the Inspector-General is authorised to punish Inspectors and all police officers of "lower ranks". Regulation 489 provides for the departmental trials of police officers and regulation 490 provides that the departmental trials of police officers must be conducted

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in accordance with the rules set out therein. Regulation 490 in its various clauses makes provisions about oral and documentary evidence, framing of charges, explanation of the delinquent police officer, recording of statement of defence witnesses, recording of findings by the Superintendent of Police and the making of a report by the enquiry officer if he is of the view that the delinquent police officer should be dismissed or removed from the force. Clause (9) provides that the police officer may not be represented by counsel in any proceedings instituted against him under the rules. By regulation 508, every police officer against whom an order of dismissal or removal is passed is entitled to prefer one appeal against an order of dismissal from the police force to the authorities prescribed in that behalf, but against the order of the Governor in exercise of authority reserved under regulation 479, cl. (a), no appeal is provided.

By s. 96-B of the Government of India Act, 1915, the tenure of all civil officers including police officers was at the pleasure of the Sovereign. In exercise of the powers conferred by sub-s. (2) of s. 96-B, classification rules were framed by the local governments. In the Government of India Act, 1935, Chapter 2 of Part X dealt with civil services, their tenure, recruitment and conditions of service. The section corresponding to s. 96-B of the Government of India Act, 1915, in the later Act was s 240(1) and thereunder all members of the civil service held office during the pleasure of the Sovereign By the Government of India Act, 1935, to every civil servant a two-fold protection was guaranteed by cls. (2) and (3) of s. 240(1) that he shall not be dismissed from service by any authority subordinate to that by which he was appointed and that he shall not be dismissed or reduced in rank until he has been given a reasonable opportunity of showing cause against the action proposed to be taken in regard to him. But these provisions did not apply

to police officers for whom a special provision was enacted in s. 243. That section provided:

> "Notwithstanding anything in the foregoing provisions of this chapter, the conditions of service of the subordinate ranks of the various police forces in India shall be such as may be determined by or under the Act relating to those forces respectively."

The conditions of service of the police force of the subordinate ranks were under the Government of India Act, 1935, therefore only such as were prescribed by rules framed under s. 7 and s. 46(2) of the Police Act. By the Constitution of India, the distinction between police officers and other civil servants in the matter of protection by constitutional guarantees is abolished and as from January 26, 1950, the recruitment and conditions of service of all persons serving the Union or the State are now governed by Art. 309 and their tenure by Art. 310 of the Constitution. By Art. 311, the protection granted under s. 240, cls. (2) and (3) of the Government of India Act is extended to members of the police force as well. By Art. 309, the conditions of service of public servants are made subject to the provisions of the Constitution and the Acts of the appropriate Legislature. By Art. 310, except as expressly provided by the Constitution (i.e., except in cases where there is an express provision for dismissal of certain public servants, e.g., Judges of the Supreme Court and of the High Courts, Comptroller and Auditor-General of India, Chief Election Commissioner), all civil servants who hold office under the Union of India hold office during the pleasure of the President and all civil servants who hold office under the State hold it during the pleasure of the Governor. By virtue of Art. 313 of the Constitution, until other provision is made, all laws in force immediately before the Constitution and applicable to any

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public service which continues to exist under the Union or a State shall continue in force so far as consistent with the Constitution: the power of the police functionaries to dismiss police officers is therefore preserved.

On November 4, 1947, the Governor of U. P. in exercise of the powers conferred *inter alia* by s. 7 of the Police Act, published the Tribunal Rules. By r. 1, cl. (3), these rules apply "to all Government servants under the rule making control of the Governor" and are applicable to any acts, omissions or conduct arising before the date of commencement of the rules as they are applicable to those arising after that date. Cl. (*c*) of r. 2 defines "corruption", cl. (*d*) defines "failure to discharge duties properly" and cl. (*e*) defines "personal immorality". Rule 4 authorises the Governor to refer to a Tribunal constituted under r. 3, cases relating to an individual Government servant or class of Government servant or servants in a particular area only in respect of matters involving (*a*) corruption, (*b*) failure to discharge duties properly, (*c*) irremediable general inefficiency in a public servant of more than ten years' standing, and (*d*) personal immorality. By cl. (2), the Governor is also authorised in respect of a gazetted Government servant on his own request to refer his case to the tribunal in respect of matters referred to in sub-r. (1). By r. 7, the proceedings of the tribunal are to be conducted *in camera* and neither the prosecution nor the defence has the right to be represented by counsel. Rule 8 prescribes the procedure to be followed by the Tribunal and r. 9 deals with the record to be maintained by the tribunal. Rule 10 states that the Governor shall not be bound to consult the Public Service Commission on the tribunal's recommendations and shall pass an order of punishment in the terms recommended by the tribunal, provided "the Governor may for sufficient reasons, award a lesser punishment". Rule 12 pro-

vides that nothing in the rules shall be deemed to affect the conduct of disciplinary proceedings in cases other than those specifically covered by the provisions of the Tribunal Rules. Rule 13 authorises the Governor to delegate the power to refer cases to gazetted officers in charge of district and to pass an order of punishment under r. 10 to heads of departments.

Enquiry against the appellant, though commenced before the Constitution was concluded after the Constitution, and the order dismissing him from the police force was passed in December, 1950. Under Police Regulation 479 (*a*), the Governor had the power to dismiss a police officer. The Tribunal Rules were framed in exercise of various powers vested in the Governor including the power under s. 7 of the Police Act, and by those rules, the Governor was authorised to pass appropriate orders concerning police officers. By virtue of Art. 313, the Police Regulations as well as the Tribunal Rules in so far as they were not inconsistent with the provisions of the Constitution remained in operation after the Constitution. The authority vested in the Inspector-General of Police and his subordinates by s. 7 of the Police Act was not exclusive. It was controlled by the Government of India Act, 1935, and the Constitution which made the tenure of all civil servants of a Province during the pleasure of the Governor of that Province. The plea that the Governor had no power to dismiss the appellant from service and such power could only be exercised by the Inspector-General of Police and the officers named in s. 7 of the Police Act is therefore without substance.

But it is urged that the enquiry held by the Tribunal against the appellant and the order consequent upon that enquiry deprived the appellant of the equal protection of the laws and were therefore void as infringing Art. 14

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of the Constitution. It is true that when proceedings were started against the appellant for an enquiry for his alleged misdemeanours, one of two distinct procedures for holding an enquiry, was open for selection by the authorities. The police authorities could direct an enquiry under the Police Regulations under the procedure prescribed by regulation 490; it was also open to the Governor to direct an enquiry against the appellant, and as the charges against him fell within r. 4 of the Tribunal Rules, the procedure for enquiry was the one prescribed by r. 8 of the Tribunal Rules. Relying upon the existence of these two sets of rules simultaneously governing enquiries against police officers either of which could be resorted to at the option of the authorities in respect of charges set out in r. 4 of the Tribunal Rules, it was urged that in directing an enquiry against the appellant under the Tribunal Rules, discrimination was practised against him, and he was deprived of the guarantee of equal protection of the laws. That an equiry against the appellant could have been made under the procedure prescribed by regulation 490 of the Police Regulations appears to be supported by rr. 1(3), 4 and 12 of the Tribunal Rules. Rule 1, sub-r. (3), provides that the Tribunal Rules shall apply to all Government servants under the rule making control of the Governor, and by r. 4, the Governor is authorised to refer cases to the tribunal, but he is not obliged to do so. By r. 12, nothing in the Tribunal Rules is to affect the conduct of disciplinary proceedings in cases other than those specifically dealt with under the rules.

But the order of the Governor directing an enquiry against the appellant was passed before the Constitution, and Art. 14 has no retrospective operation; it does not vitiate transactions even if patently discriminatory which were completed before the commencement of the Consti-

tution. In *Syed Qasim Razvi* v. *The State of Hyderabad* (1), this court was called upon to decide whether a trial of an offender commenced before the Constitution under the Special Tribunal Regulation promulgated by the Military Governor of the Hyderabad State was, since the Constitution, invalid in view of Art. 14. MUKHERJEA, J. speaking for the majority of the court observed:

> ". . . . . the effect of Article 13(1) of the Constitution is not to obliterate the entire operation of the inconsistent laws or to wipe them out altogether from the statute book; for to do so will be to give them retrospective effect which they do not possess. Such laws must be held to be valid for all past transactions and for enforcing rights and liabilities accrued before the advent of the Constitution. On this principle, the order made by the Military Governor referring this case to the Special Tribunal cannot be impeached and consequently the Special Tribunal must be deemed to have taken cognizance of the case quite properly, and its proceedings up to the date of the coming in of the Constitution would also have to be regarded as valid."

Similarly, DAS, J. in *Lachmandas Kewalram Ahuja* v. *The State of Bombay* (2) in dealing with the validity of proceeding before the Special Judge holding a trial before the Constitution observed:

> "As the Act was valid in its entirety before the date of the Constitution, that part of the proceeding before the Special Judge, which, up to that date, had been regulated by this special procedure cannot be questioned, however discriminatory it may have been . . . . . ."

(1) 1958 S. C. R. 589. (2) 1952 S. C. R. 710.

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Selection by the authorities of one of two alternative procedures at a time when Article 14 was not in operation, does not, therefore, enable the appellant to contest the validity of the enquiry on the plea of denial of equal protection of the laws. It was also observed in *Syed Qasim Razvi's* case (1) by MUKHERJEA, J., at p. 606:

> "In cases of the type (where the trial commenced before the Constitution) which we have before us where part of the trial could not be challenged as bad and the validity of the other part depends on the question as to whether the accused has been deprived of equal protection in matters of procedure, it is incumbent upon the court to consider, firstly, whether the discriminatory or unequal provisions of law could be separated from the rest and even without them a fair measure of equality in the matter of procedure could be secured to the accused. In the second place, it has got to consider whether the procedure actually followed did or did not proceed upon the basis of the discriminatory provisions. In our opinion, a mere threat or possibility of unequal treatment is not sufficient. If actually the accused has been discriminated against, then and then only he can complain, not otherwise.
>
> We may mention here that the impossibility of giving the accused the substance of a trial according to normal procedure at the subsequent stage may arise not only from the fact that the discriminatory provisions were not severable from the rest of the Act and the court consequently had no option to continue any other than the discriminatory procedure; or it may arise from something done at the previous stage which though not invalid at that time precludes the adoption of a different procedure subsequently."

(1) 1953 S. C. R. 589.

The proceedings of the Tribunal prior to the commencement of the Constitution are, therefore, not open to challenge except to the limited extent indicated by MUKHERJEA, J. The question which falls to be considered is whether the procedure followed by the Tribunal after the Constitution was discriminatory and operated to the prejudice of the appellant.

Regulation 490 of the Police Regulations set out the procedure to be followed in an enquiry by the police functionaries, and rules 8 and 9 of the Tribunal Rules set out the procedure to be followed by the Tribunal. There is no substantial difference between the procedure prescribed for the two forms of enquiry. The enquiry in its true nature is quasi-judicial. It is manifest from the very nature of the enquiry that the approach to the materials placed before the enquiring body should be judicial. It is true that by regulation 490, the oral evidence is to be direct, but even under rule 8 of the Tribunal Rules, the tribunal is to be guided by rules of equity and natural justice and is not bound by formal rules of procedure relating to evidence. It was urged that whereas the tribunal may admit on record evidence which is hearsay, the oral evidence under the Police Regulations must be direct evidence and hearsay is excluded. We do not think that any such distinction was intended. Even though the tribunal is not bound by formal rules relating to procedure and evidence, it cannot rely on evidence which is purely hearsay, because to do so in an enquiry of this nature would be contrary to rules of equity and natural justice. The provisions for maintaining the record and calling upon the delinquent public servant to submit his explanation are substantially the same under regulation 490 of the Police Regulations and rule 8 of the Tribunal Rules. It is urged that under the Tribunal Rules, there is a departure in respect of

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important matters from the Police Regulations which render the Tribunal Rules prejudicial to the person against whom enquiry is held under those rules. Firstly, it is submitted that there is no right of appeal under the Tribunal Rules as is given under the Police Regulations; secondly, that the Governor is bound to act according to the recommendations of the tribunal and thirdly, that under the Tribunal Rules, even if the complexity of a case under enquiry justifies engagement of counsel to assist the person charged, assistance by counsel may not be permitted at the enquiry. These three variations, it is urged, make the Tribunal Rules not only discriminatory but prejudicial as well to the person against whom enquiry is held under these rules. In our view, this plea cannot be sustained. The Tribunal Rules and the Police Regulations in so far as they deal with enquiries against police officers are promulgated under section 7 of the Police Act, and neither the Tribunal Rules nor the Police Regulations provide an appeal against an order of dismissal or reduction in rank which the Governor may pass. The fact that an order made by a police authority is made appealable whereas the order passed by the Governor is not made appealable is not a ground on which the validity of the Tribunal Rules can be challenged. In either case, the final order rests with the Governor who has to decide the matter himself. Equal protection of the laws does not postulate equal treatment of all persons without distinction: it merely guarantees the application of the same laws alike and without discrimination to all persons similarly situated. The power of the Legislature to make a distinction between persons or transactions based on a real differentia is not taken away by the equal protection clause. Therefore by providing a right of appeal against the order of police authorities acting under the Police Regulations imposing penalties upon a member of the police force, and by providing

no such right of appeal when the order is passed by the Governor, no discrimination inviting the application of Article 14 is practised.

Under rule 10 of the Tribunal Rules, the Governor is enjoined to pass an order of punishment in terms recommended by the Tribunal, whereas no such obligation is cast upon the police authority who is competent to dismiss a police officer when an enquiry is held under regulation 490 of the Police Regulations. To the extent that rule 10 requires the Governor to accept the recommendation of the tribunal, the rule may be regarded as inconsistent with the Constitution, because every police officer holds office during the pleasure of the Governor, and is entitled under Article 311(2) to a reasonable opportunity to show cause to the satisfaction of the Governor against the action proposed to be taken in regard to him. The partial invalidity of rule 10 however does not affect the remaining rules; that part of the rule which requires the Governor to accept the recommendation of the tribunal as to the guilt of the public servant concerned is clearly severable. We may observe that in considering the case of the appellant, the Governor exercised his independent judgment and passed an order of dismissal and did not act merely on the recommendation of the tribunal. The difference between the two sets of rules on the matter under consideration does not relate to the procedure of the enquiring bodies, but to the content of reasonable opportunity guaranteed by Article 311 of the Constitution.

The rules relating to appearance of lawyers at enquiries, under the Police Regulations and under the Tribunal Rules are also not different. Under clause (9) of regulation 490 of the Police Regulations, an accused police officer may not be represented by counsel in any proceeding instituted under those regulations, and by rule 7 of the Tribunal Rules, neither the prosecution

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nor the defence have the right to be represented by counsel. Both the rules deny to the police officer the right to be represented by counsel.

The procedure provided in the Police Regulations is substantially the same as the procedure prescribed by the Tribunal Rules, and by continuing the enquiry after the Constitution under the Tribunal Rules and not under the Police Regulations, a more onerous procedure prejudicial to the appellant was not adopted.

The Governor appointed the tribunal for enquiry against the appellant before the Constitution, but the order of dismissal was passed after the Constitution came into force. The appellant was entitled to the protection of Article 311(2) of the Constitution. Since the Constitution was enacted, the distinction which was made between members of the police force and other civil servants under sections 240, 241 and 243 of the Government of India Act has disappeared and all civil servants including the police officers are entitled to the protection of Article 311(2). The content of the guarantee was explained by this court in *Khem Chand* v. *The Union of India* (1). It was observed by Chief Justice DAS at p. 1096 :

> "To summarise : the reasonable opportunity envisaged by the provision under consideration includes—
>
> (*a*) an opportunity to deny his guilt and establish his innocence which he can only do if he is told what the charges levelled against him are and the allegations on which such charges are based ;
>
> (*b*) an opportunity to defend himself by cross-examining the witnesses produced against him and by examining himself or any other witnesses in support of his defence ; and finally

(1) 1958 S.C.R. 1080.

(c) an opportunity to make his representation as to why the proposed punishment should not be inflicted on him, which he can only do if the competent authority, after the enquiry is over and after applying his mind to the gravity or otherwise of the charges proved against the government servant tentatively proposes to inflict one of the three punishments and communicates the same to the government servant."

To a police officer charged with misdemeanour, opportunity in all the three branches set out in *Khemchand's* case (1) is provided under the Tribunal Rules. There is opportunity to the police officer against whom an enquiry is made to deny his guilt and to establish his innocence; there is opportunity to defend himself by cross-examination of witnesses produced against him and by examining himself and other witnesses in support of his defence, and there is also opportunity to make his representation as to why the proposed punishment should not be inflicted. The discrimination which is prohibited by Article 14 is treatment in a manner prejudicial as compared with another person similarly circumstanced by the adoption of a law, substantive or procedural, different from the one applicable to that other person. In *Sardar Kapur Singh* v. *The Union of India* (2), this court held that by directing an enquiry against a member of the Indian Civil Service who was charged with misdemeanour under the Public Servants (Inquiries) Act, 1850, and not under rule 55 of the Civil Services (Classification, Control and Appeal) Rules when there was no substantial difference between the material provisions,

(1) 1958 S.C.R. 1080 (2) (1960) 2 S. C. R. 569

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discrimination was not practised. It was observed (at p. 581) :

> "Does the holding of an enquiry against a public servant under the Public Servants (Inquiries) Act, 1850, violate the equal protection clause of the Constitution ? The appellant submits that the Government is invested with authority to direct an enquiry in one of two alternative modes and by directing an enquiry under the Public Servants (Inquiries) Act which Act it is submitted contains more stringent provisions when against another public servant similarly circumstanced an enquiry under rule 55 may be directed, Article 14 of the Constitution is infringed."

After considering the special protection given to members of the Indian Civil Service and the essential characteristics of the procedure for making enquiries under the Public Servants (Inquiries) Act, 1850, it was observed at p. 584 :

> "The primary constitutional guarantee, a member of the Indian Civil Service is entitled to, is one of being afforded a reasonable opportunity of the content set out earlier, in an enquiry in exercise of powers conferred by either the Public Servants (Inquiries) Act or rule 55 of the Civil Services (Classification, Control and Appeal) Rules, and discrimination is not practised merely because resort is had to one of two alternative sources of authority, unless it is shown that the procedure adopted operated to the prejudice of the public servant concerned. In the case before us, the enquiry held against the appellant is not in manner different from the manner in which an enquiry may be held consistently with the procedure prescribed by rule 55, and therefore on a plea of inequality before the law, the enquiry held by the

Enquiry Commissioner is not liable to be declared void because it was held in a manner though permissible in law, not in the manner, the appellant says, it might have been held."

In *Syed Qasim Razvi's* case (1), it was held that if the substance of the special procedure followed after the Constitution in an enquiry or trial commenced before the Constitution is the same as in the case of a trial by the normal procedure, the plea of discrimination invalidating a trial must fail.

Counsel for the appellant in support of his plea that the enquiry by the Tribunal was vitiated because it was held under a discriminatory procedure relied upon a judgment of this Bench in the *State of Orissa* v. *Dhirendranath Das* (2). In that case, a lower Division Assistant in the Secretariat of the Orissa Government was found guilty of certain misdemeanour by a Tribunal appointed under rules framed by the Orissa Government after an enquiry held in that behalf and was ordered to be dismissed from service. In a petition by the public servant under Article 226 of the Constitution praying for a writ declaring illegal the order of dismissal it was held by the Orissa High Court that on the date on which enquiry was directed against the petitioner—there were two sets of rules in operation, the Tribunal Rules and the Bihar and Orissa Subordinate Services Discipline and Appeal Rules—and it was open to the Government of Orissa to select either set of rules for enquiry against any public servant against whom a charge of misdemeanour was made and that selection of one in preference to the other set of rules was violative of the guarantee of Article 14 of the Constitution. The High Court accordingly declared the order of dismissal inoperative and further declared that

(1) 1958 S.C.R. 589. (2) Civil Appeal No. 103 of 1959, decided on 18th August, 1960.

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the disciplinary proceedings be restored to the stage which they had reached when the case was referred to the tribunal. Against the order, the State of Orissa preferred an appeal to this Court. The relevant rules were not in that case incorporated in the paper-book prepared for the hearing nor did counsel for the State produce for our consideration those rules. Counsel also conceded that by the adoption of the procedure prescribed by the Tribunal Rules in preference to the procedure in an enquiry under the Service Rules, discrimination would be practised because there were substantial differences in the protection to which the public servants were entitled under the Service Rules and the Tribunal Rules. The only ground pressed in support of the appeal was that the Service Rules were not in operation at the time when the enquiry in question was directed and by directing an enquiry under the Tribunal Rules, discrimination was not practised. But this argument raised for the first time questions which were never investigated and this Court declined to allow Counsel to raise them. It was observed in that case :

> "If the two sets of rules were in operation at the material time when the enquiry was directed against the respondent and by order of the Governor, the enquiry was directed under the Tribunal Rules which are 'more drastic' and prejudicial to the interest of the respondent, a clear case of discrimination arises and the order directing enquiry against the respondent and the subsequent proceedings are liable to be struck down as infringing Article 14 of the Constitution."

Before us, counsel for the appellants has produced a printed copy of the Disciplinary Proceedings (Administrative Tribunal) Rules, 1951, published by the Government of Orissa. A perusal of these rules may appa-

rently suggest that subject to certain minor differences, these rules are substantially the same as the Tribunal Rules framed by the State of U. P. We have, however, not been supplied with a copy of the Bihar and Orissa Subordinate Services Discipline and Appeal Rules, 1935. The judgment of this Court in *The State of Orissa* v. *Dhirendranath Das* (1) can have no application to this case, because in that case, the order of the High Court was assailed on the limited ground that the High Court erred in assuming that there were two sets of rules simultaneously in operation, and it was open to the Executive Government to select one or the other for holding an enquiry against a delinquent public servant. That contention was negatived and the judgment of the High Court was confirmed.

We do not think that there is any substance in the plea that discrimination was practised by continuing the enquiry under the Tribunal Rules after the Constitution was brought into force.

This appeal is filed with a certificate under Article 132 of the Constitution. By clause (3) of Article 132, the appellant is entitled to appeal to this court only on the ground that the High Court has wrongly decided a substantial question as to the interpretation of the Constitution and unless this court grants leave to him, on no other. Counsel for the appellant has challenged the regularity of the proceedings of the tribunal and we have heard him to assure ourselves that the proceeding of the tribunal has not been vitiated by any serious irregularity, or that the appellant was not deprived of the protection under Article 311 of the Constitution. We proceed to consider briefly the arguments advanced in support of that plea. It was urged in the first instance that the appellant was not permitted to appear at the enquiry before the tribunal by a lawyer whereas

(1) Civil Appeal No. 103 of 1959 decided on 18th August, 1960

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the State Government was represented by a lawyer. It was averred in paragraph 14 of the affidavit of the appellant that the case for the prosecution was conducted by Jwala Prasad, Deputy Superintendent of Police and Legal Adviser to the Anti-corruption Department, and that the tribunal was told that such a course would be contrary to the Tribunal Rules and in any case contrary to rules of equity and natural justice, because he—the appellant—was not permitted to appear by counsel. In reply, Hari Shankar Sharma, Deputy Superintendent of Police stated in his affidavit that it was not true that before the tribunal prosecution was conducted by Jwala Prasad. He also stated that the tribunal had required the presence of Sri Krishna who had made enquiries, but as Sri Krishna could not remain present, Jwala Prasad attended the sitting of the tribunal only on one day as Deputy Superintendent of Police, C. I. D., but he did not take any part in the proceedings, and "examination of witnesses and the cross-examination was all done by the members of the tribunal" and the appellant. It does not appear that Jwala Prasad was a practising lawyer: he was not in any case permitted to appear as a lawyer and on the affidavit of Hari Shankar Sharma, it is clear that he did not take any part in the examination of witnesses or cross-examination. It was then urged that the explanation submitted by the appellant was not considered because the Governor felt bound by the recommendations of the tribunal. But in paragraph 25 of the affidavit, Hari Shankar Sharma stated that the explanation of the appellant was submitted to the Government by the Inspector-General of Police and the Governor duly considered the explanation and was of opinion that the appellant was unable to clear his conduct and therefore under rule 10(1) of the Tribunal Rules the Governor ordered dismissal of the appellant from service after considering the merits of his defence. It was then

urged that the application submitted by the appellant for summoning witnesses and calling for certain records was not considered and the appellant had on that account been prejudiced. In paragraph 15 of his affidavit, the appellant stated that the tribunal refused to call for certain records and though he wanted to summon certain defence witnesses, his application in that behalf was also refused. In answer to this averment, Hari Shankar Sharma stated that the appellant had given a long list of defence witnesses and the tribunal asked him to select those witnesses whose evidence in the opinion of the appellant would be relevant and thereupon the appellant "reduced his list to a much smaller number" and all those witnesses were summoned. Then it was urged that the assessor who is required under the rules to assist the tribunal not having remained present at the hearing, the enquiry was vitiated. In paragraph 16 of the affidavit, the appellant has stated that during the enquiry S. N. Agha the assessor was absent on many days on which the case was heard and the evidence was recorded. In reply, Hari Shankar Sharma stated that the contents of paragraph 16 of the affidavit were not correct, that it was true that Agha could not attend on certain days "due to unavoidable circumstances", but the appellant was specifically asked if he had any objection to the recording of evidence in Agha's absence and the appellant having stated that he has no objection, the proceedings were continued with his written consent. He further stated that the assessor was explained the proceedings held on the days on which he had remained absent. The averments made in the affidavit of Hari Shankar Sharma were not controverted by the appellant.

On the materials placed on record, there is no substance in any of the pleas raised by the appellant relating to the regularity of the proceedings of the tribunal.

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It may be pertinent to note that even though the appellant challenged before the High Court the regularity of the proceedings of the tribunal, no argument was, it appears, advanced before the High Court in support thereof. The judgment of the High Court which is fairly detailed does not refer to any ground on which the contention was sought to be sustained.

The appeal fails and is dismissed with costs.

DAS GUPTA, J.:—I have had the advantage of reading the judgment prepared by my brother Mr. Justice SHAH; but while I respectfully agree with the conclusions on all other points, I regret my inability to agree with the conclusion reached there on the main question in controversy, viz., whether the Uttar Pradesh Disciplinary Proceedings (Administrative Tribunal) Rules, 1947, are void as being in contravention of Article 14 of the Constitution, in so far as they do not provide for any appeal against a decision by the Governor under rule 10.

The facts have been fully stated by my learned brother and need not be repeated, especially as the facts in this particular case do not arise for consideration in the decision of the question of law, whether Article 14 is contravened by the above provisions of the Tribunal Rules. Under these rules the Governor may refer to the tribunal constituted in accordance with rule 3 "cases relating to an individual government servant or class of government servants or government servants in a particular area only in respect of matters involving—(*a*) corruption; (*b*) failure to discharge duties properly; (*c*) irremediable general inefficiency in a public servant of more than ten years' standing; and (*d*) personal immorality". Under clause 3 of rule 1 these rules apply to all government servants under the rule making control of the Governor. It is not disputed that these rules apply to every member of the police service

in Uttar Pradesh and that the Governor may refer to the tribunal the cases relating to any individual government servant belonging to the police department in respect of any of the matters mentioned in clause (1) of rule 4. It is also not disputed that if the Governor does not make any such reference, the case of any such member of the police service in respect of any of these matters may be inquired into under the Uttar Pradesh Police Regulations. The co-existence of the provisions of Police Regulations on the question of departmental punishment of police officers with the Tribunal Rules, thus results in the position that of two members of the police service holding the same post and rank, one may be proceeded against in respect of any of the matters mentioned in rule 4(1) of the Tribunal Rules, under the Tribunal Rules and another may be proceeded against for the self-same matter under the Police Regulations. Where the inquiry is held under the Tribunal Rules, the tribunal has to make a record of the charges, the explanation, its own findings and the views of the assessor and where satisfied that punishment be imposed, also formulate its recommendations about punishment. Under rule 10 the Governor will then decide the case and no appeal shall lie against the order so passed by the Governor. Where the action is taken under the Police Regulations procedure, a police officer against whom an order of dismissal, removal, suspension or reduction is passed has a right of appeal to the authority prescribed in regulation 508. The question is whether the existence of the right of appeal under the Police Regulations procedure and the absence of the right of appeal against the decision by the Governor in the Tribunal Rules' procedure amounts to unequal treatment. On behalf of the respondent it has been urged that there is no unequal treatment as in one case it is the order of the Governor which is made not appealable and in the other case

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it is the order of a police functionary which is made appealable. The argument seems to be that only if in the Police Regulations an order made by the Governor had been made appealable while under the Tribunal Rules the order made by the Governor was not appealable there could be any scope for a complaint of unequal treatment. With great respect to my learned brethren who have taken the contrary view, I am of the opinion that this argument misses the realities of the position and is really an attempt to slur over the difficulty. The real position that requires examination appears to me to be this: Suppose A and B are two police officers holding the same rank and post and A is proceeded against under the Tribunal Rules on a charge of corruption while B is proceeded against on a similar charge of corruption under the Police Regulations procedure. In the first case if the tribunal finds A guilty and recommends, say, dismissal; and the Governor makes an order of dismissal, against this order there is no appeal. Suppose in B's case also the punishing authority makes an order of dismissal; but against this B has a right of appeal. It is obvious that while in the latter case B has some chance of the appellate authority taking a different view either about his guilt or about the quantum of punishment and setting aside or modifying the order, A has no such chance at all. It will be little consolation to A that the order in his case has been passed by such an high authority as the Governor. He can, it seems to me, legitimately complain that there is a real difference between the way he is treated and B is treated because of this existence of B's right of appeal against the punishing authority's order while he has no such right. Unless one assumes that the right of appeal is only in name, I do not see how one can deny that there is a legitimate basis for this complaint. I cannot agree that the right of appeal is a right without substance. Whenever one

authority sits in appeal over another authority there is always a chance that the appellate authority may take a different view of facts or of law and as regards the quantum of punishment requisite, from the authority whose decision is under appeal. It is this chance which is denied, if a right of appeal is taken away. I am therefore, of opinion that the absence of the right of appeal under rule 10 of the Tribunal Rules while a right of appeal is given to a police officer under the Police Regulations, results in unequal treatment in a substantial matter, as between a police officer proceeded against under the Tribunal Rules and an officer who is proceeded against under the Police Regulations procedure. Nor is it possible to discover any principle to guide the discretion of the Government to select some police officers to be proceeded against under the Tribunal Rules while leaving out other police officers to be proceeded against, in respect of similar matters, under the Police Regulations procedure.

I have, therefore, come to the conclusion that the Tribunal Rules in so far as they provide that no appeal shall lie against the decision of the Governor is *ultra vires* the Constitution, being in contravention of Article 14 of the Constitution.

As has been noticed by my Brother Mr. Justice SHAH a somewhat similar question fell to be considered by us in Civil Appeal No. 103 of 1959 (*State of Orissa* v. *Dhirendranath Das*). Comparing the Disciplinary Proceedings (Administrative Tribunal) Rules, 1951, of the Orissa Government under which Dhirendranath Das had been proceeded against and dismissed from service with the Bihar and Orissa Subordinate Service Discipline and Appeal Rules, 1935, this Court held that inasmuch as there was a right of appeal to the authority immediately superior to the punishing authority under the Service Rules while there is no

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such appeal against the findings and recommendations of the tribunal, the proceedings were substantially different. The court further pointed out that as inquiries could be directed according to procedures substantially different at the discretion of the executive authority "exercise whereof is not governed by any principles having any rational relation to the purpose to be achieved by the inquiry, the order selecting a prejudicial procedure, out of the two open for selection, is hit by Article 14 of the Constitution". I cannot find anything here that would justify a revision of the view taken by us in that case.

As in my judgment the U. P. Disciplinary Proceedings (Administrative Tribunal) Rules, 1947, are hit by Article 14 of the Constitution, I would allow the appeal and set aside the order of dismissal passed against the appellant.

ORDER :—In view of the majority judgment of the Court the appeal fails and is dismissed with costs.

Appeal dismissed.

SUPREME COURT

APPELLATE CIVIL

Before the Hon'ble Mr. Justice Gajendragadkar, the Hon'ble Mr. Justice Sarkar, the Hon'ble Mr. Justice Wanchoo, the Hon'ble Mr. Justice Das Gupta and the Hon'ble Mr. Justice Ayyangar.

KAILASH CHANDRA (APPELLANT)

v.

THE UNION OF INDIA (RESPONDENT)

1961
March, 16

[ON APPEAL FROM THE HIGH COURT AT ALLAHABAD]

Railway Ministerial Servants *entering service on or after April 1, 1938, or those in service from before that date but without any lien on a permanent post till then,—Whether entitled to continue in service till 60 years age—Classification of those ministerial servants retiring before 60 years in age into those retiring before and those retiring after September 8, 1948, with a provision for show cause notice and opportunity against proposed retirement to the latter—Whether constitutional—Indian Railway Establishment Code, R. 2046/2(a)—Constitution of India, 1950, Art. 14.*

The correct interpretation of rule 2046/2(a) of the Railway Establishment Code is that a railway ministerial servant may be retained in service between the ages of 55 and 60 provided he continues to be efficient. Such retention, however, rests solely in the discretion of the appropriate authority and cannot be claimed as of right by a servant even though his efficiency is undisputed.

The classification of railway ministerial servants retiring between the ages of 55 and 60 years into those retiring up to and those retiring after September 8, 1948, with a provision for show cause notice and opportunity against proposed retirement to the latter category alone is reasonable and permissible and is not, therefore, hit by the guarantee of equal protection under the Constitution.

Raghunath Narain Mathur v. *Union of India* (1), *Kishan Dayal* v. *General Manager, Northern Railways* (2) and *Basant Kumar Pal* v. *Chief Electric Engineer* (3) approved.

Civil Appeal No. 283 of 1960, from the judgment and decree, dated the 20th November, 1958, of the

(1) A.I.R. 1953 All. 352. (2) A.I.R. 1954 Punj. 245.
(3) A.I.R. 1956 Cal. 98.

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Allahabad High Court (Lucknow Bench) in First Civil Appeal No. 3 of 1956.

The facts appear in the judgment.

C. B. Agarwala, Senior Advocate (*C. P. Lal*, Advocate, with him) for the appellant.

R. Ganapathy Iyer and *T. M. Sen*, Advocates, for the respondent.

The following judgment of the Court was delivered by—

DAS GUPTA, J.:—The appellant, a clerk in the service of the East Indian Railways was compulsorily retired from service with effect from June 30, 1948, on attaining the age of 55 years. His prayer for further retention in service on the ground that he was entitled to be retained under rule 2046/2 of the Railway Establishment Code having been rejected he brought the suit which has given rise to this appeal in the court of the Civil Judge, Lucknow, alleging that he was entitled to be retained under the above rule and the order for compulsory retirement on attaining the age of 55 years was void and inoperative in law. He accordingly prayed for a declaratory decree that the order of his compulsory retirement was illegal and void and for a money decree for arrears of pay on the basis that he had continued in service.

The main defence was a denial of his right to be retained in service under the rules. The Trial Court accepted the plaintiff's contention as regards the effect of the rule, gave him a declaration as prayed for and also decreed the claim for money in part.

On appeal the High Court took a different view of rule 2046 and held that that rule gave the plaintiff no right to continue in service beyond the age of 55 years. The High Court, therefore, allowed the appeal and dismissed the plaintiff's suit. Against this decision the

plaintiff has preferred the present appeal on a certificate granted by the High Court under Article 133(1) (c) of the Constitution.

The main question therefore is whether on a proper interpretation of rule 2046/2(a) of the Railway Establishment Code, which is identical with the fundamental rule 56 (b) (i), the plaintiff had the right to be retained in service till the age of 60 years. It is necessary to mention that the plaintiff's case that he continued to be efficient even after attaining the age of 55 years has not been disputed by the respondent, the Union of India Consequently the question is: Assuming the plaintiff so continued to be efficient whether he had the right to be retained in service till he attained the age of 60 years. Rule 2046 (1) of the Code deals with the question of retirement of railway servants other than ministerial and provides that such railway servant, that is, one who is not a ministerial servant, will be compulsory retired on attaining the age of 55 years; but may be retained in service after that date "with the sanction of the competent authority on public grounds" which must be recorded in writing. A further provision is made that he must not be retained after the age of 60 years except in very special circumstances. Rule 2046/2 deals with cases of ministerial servants. It has two clauses of which clause (b) deals with (i) ministerial servants who entered Government service on or after April 1, 1938, or (ii) who though in Government service on March 31, 1938, did not hold a lien or a suspended lien on a permanent post on that date. These also, like the railway servants, who are not ministerial servants have to retire ordinarily at the age of 55 years and cannot be retained after that age except on public grounds to be recorded in writing and with the sanction of the competent authority; and must not be retained after attaining the age of 60 years except in very special circumstances.

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Clause (*a*) deals with railway ministerial servants other than those who entered Government service on or after April 1, 1938, or those in Government service on March 31, 1938, who did not hold a lien or a suspended lien on a permanent post on that date. The exact words of the rule are :

> "A ministerial servant who is not governed by sub-clause (*b*) may be required to retire at the age of 55 years but should ordinarily be retained in service if he continues to be efficient up to the age of 60 years. He must not be retained after that age except in very special circumstances which must be recorded in writing and with the sanction of the competent authority."

It is obvious that the rule as regards compulsory retirement is more favourable to ministerial servants who fall within clause (*a*) of rule 2046/2 than those who fall under clause (*b*) of the same rule or railway servants who are not ministerial servants. For whereas in the case of these, viz., railway servants—who are not ministerial servants, and ministerial servants under clause (*b*) retention after the age of 55 itself is intended to be exceptional—to be made on public grounds which must be recorded in writing and with the sanction of the competent authority, in the case of ministerial servants who fall under clause (*a*) of rule 2046/2 their retention after the age of 60 is treated as exceptional and to be made in a similar manner as retention in the case of the other railway servants mentioned above after the age of 55. It is clear therefore that whereas the authority appropriate to make the order of compulsory retirement or of retention is given no discretion by itself to retain a ministerial railway servant under clause (*b*) if he attains the age of 55 years, that is not the position as regards the ministerial servants who fall under clause (*a*). The appellant's

contention however goes very much further. He contends that in the case of ministerial servants who come within clause (*a*) and after attaining the age of 55 years continue to be efficient it is not even a case of discretion of the appropriate authority to retain him or not, but that such ministerial servants have got a right to be retained and the appropriate authority is bound to retain him, if efficient.

The first clause of the first sentence of the relevant rule taken by itself certainly gives the appropriate authority the right to require a ministerial servant to retire as soon as he attains the age of 55 years. The question is: Whether this right is cut down by the second clause, viz., "but should ordinarily be retained in service if he continues to be efficient up to the age of 60 years". On behalf of the appellant it is urged that the very use of the conjunction "but" is for the definite purpose of the cutting down of the right conferred by the first clause; and that the effect of the second clause is that the right to require the Government servant to retire at 55 is limited only to cases where he does not retain his efficiency; but where he does retain his efficiency the right to retire him is only when he attains the age of 60 years. We are constrained to say that the language used in this rule is unnecessarily involved; but at the same time it is reasonably clear that the defect in the language creates no doubt as regards the intention of the rule-making authority. That intention, in our opinion, is that the right conferred by the first part is not in any way limited or cut down by the second part of the sentence; but the draftsman has thought fit by inserting the second clause to give to the appropriate authority an option to retain the servant for five years more, subject to the condition that he continues to be efficient. If this condition is not satisfied the appropriate authority has no option to

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retain the servant; where however the condition is satisfied the appropriate authority has the option to do so but is not bound to exercise the option. If the intention had been to cut down the right conferred on the authority to retire a servant at the age of 55 years the proper language to express such intention would have been; . . . . . "may be required to retire at the age of 55 years provided however that he shall be retained in service if he continues to be efficient up to the age of 60 years" or some such similar words. The use of "should ordinarily be retained in service" is sufficient index to the mind of the rule-making authority that the right conferred by the first clause of the sentence remained. Leaving out for the present the word "ordinarily" the rule would read thus :

> "A ministerial servant who is not governed by sub-clause (*b*) may be required to retire at the age of 55 years but should be retained in service if he continues to be efficient up to the age of 60 years."

Reading these words without the word "ordinarily" we find it unreasonable to think that it indicates any intention to cut down at all the right to require the servant to retire at the age of 55 years or to create in the servant any right to continue beyond the age of 55 years if he continues to be efficient. They are much more appropriate to express the intention that as soon as the age of 55 years is reached the appropriate authority has the right to require the servant to retire but that between the age of 55 and 60 the appropriate authority is given the option to retain the servant but is not bound to do so.

This intention is made even more clear and beyond doubt by the use of the word "ordinarily". "Ordinarily" means "in the large majority of cases but not invariably". This itself emphasises the fact that the

appropriate authority is not bound to retain the servant after he attains the age of 55 even if he continues to be efficient. The intention of the second clause therefore clearly is that while under the first clause the appropriate authority has the right to retire the servant who falls within clause (a) as soon as he attains the age of 55, it will, at that stage, consider whether or not to retain him further. This option to retain for the further period of five years can only be exercised if the servant continues to be efficient; but in deciding whether or not to exercise this option the authority has to consider circumstances other than the question of efficiency also; in the absence of special circumstances he "should" retain the servant; but what are special circumstances is left entirely to the authority's decision. Thus, after the age of 55 is reached by the servant the authority has to exercise its discretion whether or not to retain the servant; and there is no right in the servant to be retained, even if he continues to be efficient.

Reliance was placed by learned counsel on an observation of MUKHERJEA, J. (as he then was), in *Jai Ram v. Union of India* (1) when speaking for the court as regards this rule his Lordship said :

> "We think it is a possible view to take upon the language of this rule that a ministerial servant coming within the purview has normally the right to be retained in service till he reaches the age of 60. This is conditional undoubtedly upon his continuing to be efficient. We may assume therefore for purposes of this case that the plaintiff had the right to continue in service till 60 and could not be retired before that except on the ground of inefficiency."

(1) A.I.R. 1954 S.C. 584.

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It would be wholly unreasonable however to consider this as a decision on the question of what this rule means. Dealing with an argument that as the plaintiff under this rule has the right to continue in service till 60 and could not be retired before that except on the ground of inefficiency certain results follow, the court assumed for the sake of argument that this interpretation was possible and proceeded to deal with the learned counsel's argument on that basis. It was not intended to say that this was the correct interpretation that should be put on the words of the rule.

The correct interpretation of rule 2046(1) (*a*) of the Code, in our opinion, is that a railway ministerial servant falling within this clause may be compulsorily retired on attaining the age of 55 but when the servant is between the age of 55 and 60 the appropriate authority has the option to continue him in service, subject to the condition that the servant continues to be efficient but the authority is not bound to retain him even if a servant continues to be efficient.

It may be mentioned that this interpretation of the rule has been adopted by several High Courts in India (*Basant Kumar Pal* v. *The Chief Electrical Engineer* (1); *Kishan Dayal* v. *General Manager, Northern Railway* (2) and *Raghunath Narain Mathur* v. *Union of India* (3).

We, therefore, hold that the High Court was right in holding that this rule gave the plaintiff no right to continue in service beyond the age of 55.

It was next urged by Mr. *Aggarwal*, though faintly, that the notification of the Railway Board, dated October 19, 1948, and the further notification, dated April 15, 1952, as a result of which ministerial servants who were retired under rule 2046(1)(*a*) before attaining the

(1) A.I.R. 1956 Cal. 98. (2) A.I.R. 1954 Punj. 245
(3) A.I.R. 1958 All. 372.

age of 60 after September 8, 1948, have been given special treatment are discriminatory. It appears that on September 8, 1948, the Government of India came to a decision that no ministerial Government servant to whom the fundamental rule 56(*b*)(i) applied and who has attained the age of 55 years but has not attained the age of 60 years could be required to retire from service unless he has been given a reasonable opportunity to show cause against the proposed retirement and unless any representation that he may desire to make in this connection has been duly considered. This decision was communicated to different departments of the Government of India and it was directed that this should be noted "for future guidance". On October 19, 1948, the Ministry of Railways issued a notification for dealing with cases of retirement of ministerial servants governed by rule 2046(2)(*a*) [which corresponded to fundamental rule 56(*b*)(i)] in the manner as directed by the Government of India's notification, dated September 8, 1948. This notification of October 19, 1948, again made it clear that it had been decided not to take any action in respect of ministerial servants who had already been retired. Again, in a notification dated April 15, 1952, the Railway Board communicated a decision that "such of the ministerial servants who had been retired after 8th September, 1948, but before attaining the age of 60 years without complying with Article 311 (2) of the Constitution should be taken back to duty" under certain conditions.

The appellant's contention is that the denial of this advantage given to other ministerial servants falling within rule 2046 (1) (*a*) who had been retired after September 8, 1948, is unconstitutional. We do not think that this contention has any substance. What happened was that on September 8, 1948, the Govern-

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ment took a decision that ministerial servants should not be retired under the rule in question on attainment of 55 years of age if they were efficient without giving them an opportunity of showing cause against the action and accordingly from that date it changed its procedure as regards the exercise of the option to retire servants between the age of 55 and 60. The decision that nothing should be done as regards those who had already retired on that date cannot be said to have been arbitrarily made. The formation of a different class of those who retired after September 8, 1948, from those who had retired before that date on which the decision was taken is a reasonable classification and does not offend Article 14 of the Constitution. This contention is therefore, also rejected.

The High Court was therefore right, in our opinion, in holding that there was a reasonable classification of the ministerial servants who had been retired under rule 2046 (2) (a) on attaining the age of 55 into two classes : one class consisting of those who had been retired after September 8, 1948, and the other consisting of those who retired up to September 8, 1948. There is, therefore, no denial of equal protection of laws guaranteed by Article 14 of the Constitution.

In the result, the appeal fails and is dismissed. There will be no order as to costs, the appellant is a pauper. We make no order under Order XIV, rule 9 of the Supreme Court Rules.

Appeal dismissed.

SUPREME COURT

APPELLATE CIVIL

Before the Hon'ble Mr. Justice Gajendragadkar, the Hon'ble Mr. Justice Sarkar, the Hon'ble Mr. Justice Subba Rao, the Hon'ble Mr. Justice Wanchoo and the Hon'ble Mr. Justice Mudholkar.

STATE OF UTTAR PRADESH AND OTHERS

(APPELLANTS)

v.

AJODHYA PRASAD (RESPONDENT)

1960

November 25.

[ON APPEAL FROM THE HIGH COURT AT ALLAHABAD]

Police Act, 1861 *s. 7—Dismissal of a Police Officer, Police Regulations paras* 486 *and* 489—*Construction of—Departmental trial, preceded by Magisterial enquiry—Effect of— Para* 486 *of the Police Regulations, whether applicable to the case.*

Where a police officer was charged with remissness in the discharge of duty and of dishonesty, corruption and misbehaviour or he was transferred from one station to another after a magisterial enquiry and thereafter dismissed by the Superintendent of Police after a trial under section 7 of the Police Act. He filed a writ petition before the High Court which quashed the order of dismissal on the ground that the police officer having been charged with commission of cognizable offences, para 486(1) of the Police Regulations governed the situation and no case as required by para 486(1) having been registered against the police officer in the police station, the order of dismissal was invalid.

On an appeal by the State by special leave to the Supreme Court on the ground that a magisterial enquiry having been held in regard to practically all the charges, the subject-matter of the departmental trial, the case was not covered by the provisions of para 486 of the Police Regulations.

Held, that the departmental enquiry was only a further step in respect of the misconduct of the respondent in regard whereto the magisterial enquiry was held at an earlier stage,

A combined reading of the provisions of paras 486 and 489 of the Police Regulations indicate that para 486 does not apply to a case where a magisterial enquiry is ordered and a police

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officer can be departmentally tried under s. 7 of the Police Act after such magisterial enquiry.

The departmental trial having been held subsequent to the completion of the magisterial enquiry, the case fell within the express terms of para 489(2) and the trial was consequently valid.

The appeal was accordingly allowed and the case remanded to the High Court for disposal according to law.

The State of U. P. v. *Babu Ram Upadhya* (1) referred to.

Civil Appeal no. 270 of 1959, from the judgment and order, dated the 23rd December, 1957, of the Allahabad High Court (Lucknow Bench), Lucknow in Civil Miscellaneous Application no. 86 of 1954.

The facts appear in the judgment.

C. B. Agarwala, Senior Advocate; *G. C. Mathur* and *C. P. Lal,* Advocates with him, for the appellants.

Achru Ram, Senior Advocate; *S. N. Andley, Rameshwar Nath, J. B. Dadachanji* and *P. L. Vohra,* Advocates of Messrs. R. N. & Co., with him, for the respondent.

(*Per* SARKAR, SUBBA RAO and MUDHOLKAR, JJ.)

SUBBA RAO, J.:—This is an appeal by special leave against the judgment and order of the High Court of Judicature at Allahabad, Lucknow Bench, allowing the petition filed by the respondent under Article 226 of the Constitution.

The facts are in a small compass and may be briefly stated. In the year 1933, the respondent was appointed a constable in U. P. Police Force; on 1st December, 1945, he was promoted to the rank of head constable and in May, 1952, he was posted as officer incharge of Police Station Intiathok, district Gonda. Complaints were received by the District Magistrate, Gonda, to the effect that the respondent was receiving bribes in the discharge of his duties. On 16th September, 1952, the District Magistrate, Gonda, directed the Sub-Divisional

(1) I.L.R. [1961] 1 All. 509.

Magistrate to make an enquiry in respect of the said complaints. On 3rd November, 1952, the Sub-Divisional Magistrate, after making the necessary enquiries, submitted a report to the District Magistrate recommending the transfer of the respondent to some other station. On 17th November, 1952, the District Magistrate sent an endorsement to the Superintendent of Police to the effect that the Sub-Divisional Magistrate had found substantial complaints against the integrity of the respondent, that he had also received such complaints and that his general reputation for integrity was not good, but that his transfer should, however, come after sometime and that in the meantime his work might be closely watched. On being called upon by the superintendent of Police to submit an explanation for his conduct, the respondent submitted his explanation on 29th November, 1952. On 17th December, 1952, the respondent was forced to go on leave for two months. Before the expiry of his leave, he was reverted to his substantive post of head constable and transferred to Sitapur. On 17th February, 1953, he was promoted to the rank of officiating Sub-Inspector and posted as Station Officer at Sidholi. On 27th February, 1953, the Superintendent of Police made the following endorsement in his character roll:

> "A strong officer with plenty of push in him and met with a strong opposition in this new charge. Crime control was very good but complaints of corruption were received which could not be substantiated. Integrity certified."

Meanwhile on further complaints, the C.I.D. probed the matter further and on 26th July, 1953, the Superintendent of Police, Investigation Branch, C.I.D., reported that the respondent was a habitual bribe-taker. On 28th July, 1953, he was placed under suspension and

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on 18th August, 1953, he was charged under section 7 of the Police Act with remissness in the discharge of his duty and unfitness for the same inasmuch as while posted as a Station Officer, Police Station Intiathok, he had been guilty of dishonesty, corruption and misbehaviour in that he had on nine occasions, particulars of which were given in the charge, accepted bribes. It may be mentioned that the magisterial inquiry related to seven of the nine charges alleged against the respondent. The trial was conducted by the Superintendent of Police and the respondent submitted his explanation on 12th September, 1953. The Superintendent of Police, who conducted the trial, examined many witnesses and found that seven out of the nine charges had been established. Thereafter he issued a notice to the respondent calling upon him to show cause why he should not be dismissed from the police force. On 20th February, 1954, the respondent submitted his explanation and the Superintendent of Police, by his order dated 22nd February, 1954, dismissed the respondent from service with effect from the said date. The appeal preferred by the respondent to the Deputy Inspector General of Police was dismissed by his order, dated 2nd June, 1954. Thereafter the respondent on 5th August, 1954, filed a petition under Article 226 of the Constitution before the High Court of Judicature at Allahabad, Lucknow Bench, for quashing the order of dismissal.

Before the High Court three points were raised, namely, (1) as the petitioner was officiating as Sub-Inspector of Police at the time of the departmental trial the Superintendent of Police had no power to dismiss him, since an order in such circumstances could only be made by a police officer senior in rank to a Superintendent; (2) the trial was vitiated by a number of serious irregularities; and (3) the specific acts with which the petitioner was charged were cognizable offences and, therefore,

the Superintendent of Police had no jurisdiction to proceed with a departmental trial without complying with the provisions of sub-paragraph (1) of para. 486 of the Police Regulations. The learned Judges of the High Court held that the respondent was charged with committing cognizable offences and therefore sub-paragraph (1) of para. 486 governed the situation and that, as no case, as required by the said sub-paragraph, was registered against the respondent in the police station, the order of dismissal was invalid. They further held that the case was not covered by the first proviso to sub-paragraph (1) of para. 486, as, in their opinion, the information about the commission of the offences was not in the first instance received by the Magistrate and forwarded to the police for inquiry. In view of that finding they found it unnecessary for them to express any opinion upon other arguments which had been advanced on behalf of the respondent. In the result, they issued a writ in the nature of *certiorari* quashing the impugned orders. Hence the appeal.

Mr. *C. B. Agarwala*, learned counsel appearing for the appellants, raised before us the following points: (1) The Governor exercised his pleasure through the Superintendent of Police, and, as the Police Regulations were only administrative directions, the non-compliance therewith would not in any way affect the validity of the order of dismissal. (2) If the order of dismissal was held to have been made under the statutory power conferred upon the Superintendent of Police, the regulations providing for investigation in the first place under chapter XIV of the Criminal Procedure Code were only directory in nature, and inasmuch as no prejudice was caused to the respondent the non-compliance with the said regulations would not affect the validity of the order of dismissal. (3) The Superintendent of Police was authorized to follow the alternative procedure

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prescribed by sub-paragraph (3) of para. 486, and, therefore, the inquiry held without following the procedure prescribed by rule I was not bad. (4) As the magisterial inquiry was held in regard to practically all the charges, the subject-matter of the departmental trial, the case is not covered by the provisions of para. 486 of the Police Regulations.

In the case of *The State of U. P.* v. *Babu Ram Upadhya* (1), in which we have just delivered the judgment, we have considered the first three points and for the reasons mentioned therein we reject the first three contentions.

The appellants must succeed on the fourth contention. From the facts already narrated, the conduct of the respondent, when he was officer incharge of the Police Station, Intiathok, was the subject-matter of magisterial inquiry. The Sub-Divisional Magistrate made inquiry in respect of seven of the charges which were the subject-matter of the departmental trial and submitted a report to the District Magistrate. The District Magistrate, in his turn, made an endorsement on the report and communicated the same to the Superintendent of Police recommending the transfer of the respondent and suggesting that in the meanwhile the work of the respondent might be closely watched. Though the Superintendent of Police gave at first a good certificate to the respondent, in respect of the same a further probe was made through the C.I.D. Thereafter the Superintendent of Police conducted a departmental trial in respect of the aforesaid seven charges and two other new charges of the same nature. The inquiry ended in the dismissal of the respondent. In the circumstances it would be hypertechnical to hold that there was no magisterial inquiry in respect of the

(1) I.L.R. [1961] 1 All 509

matter which was the subject-matter of the departmental trial. On the said facts we hold that the departmental inquiry was only a further step in respect of the misconduct of the respondent in regard whereto the magisterial inquiry was held at an earlier stage. If so, the question is whether para. 486 would govern the present inquiry or it would fall outside its scope.

The relevant provisions of the Police Regulations read:

> *Paragraph* 486: "When the offence alleged against a police officer amounts to an offence only under section 7 of the Police Act, there can be no magisterial inquiry under the Criminal Procedure Code. In such cases, and in other cases until and unless a magisterial inquiry is ordered, inquiry will be made under the direction of the Superintendent of Police in accordance with the following rules;"
>
> .....
>
> *Paragraph* 489: "A police officer may be departmentally tried under section 7 of the Police Act—
>
> (1) after he has been tried judicially;
>
> (2) after a magisterial inquiry under the Criminal Procedure Code;
>
> (3) after a police investigation under the Criminal Procedure Code or a departmental enquiry under paragraph 486 III above."

A combined reading of these provisions indicates that para. 486 does not apply to a case where a magisterial inquiry is ordered; and that a police officer can be departmentally tried under section 7 of the Police Act after such a magisterial inquiry. In this case the departmental trial was held subsequent to the completion of the magisterial inquiry and therefore it falls within the

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express terms of para. 489(2). The fact that in the interregnum the police received further complaints or that the C.I.D. made further enquiries do not affect the question, if substantially the subject-matter of the magisterial inquiry and the departmental trial is the same. In this case we have held that it was substantially the same and therefore the departmental trial was validly held. We, therefore, set aside the order made by the High Court. As we have pointed out earlier, the High Court, in the view taken by it, did not express its opinion on the other questions raised and argued before it. In the circumstances, we remand the matter to the High Court for disposal in accordance with law.

The costs of this appeal will abide the result.

(*Per* GAJENDRAGADKAR and WANCHOO, JJ.)

WANCHOO, J.—We have read the judgment just delivered by our learned brother SUBBA RAO, J. We agree with the order proposed by him. Our reasons for coming to this conclusion are, however, the same which we have given in *The State of Uttar Pradesh* v. *Babu Ram Upadhya* (1).

Case remanded.

(1) I.L.R. [1961] 1 All. 509.

(FULL BENCH) CRIMINAL MISCELLANEOUS

Before the Honourable M. C. Desai, Chief Justice, Mr. Justice J. Sahai and Mr. Justice B. Dayal.

STATE OF UTTAR PRADESH

v.

JAGRAJ

1961

April, 3

Appeal to Supreme Court *from an order of acquittal passed or maintained by the High Court in a criminal proceeding—Whether covered by or competent under cl. (c) of Art.* 134(1) *of the Constitution—Constitution of India,* 1950, *Art.* 134(1)(c).

Clause (c) of Art. 134(1) of the Constitution provides for appeal to the Supreme Court from any judgment, final order or sentence in a criminal proceeding of a High Court if the High Court certifies that it is a fit case for appeal to the Supreme Court. An order of acquittal passed or maintained by the High Court is covered by and equally appealable under cl. (c). There is nothing in Art. 134 or any law in force in India to restrict appeals under cl. (c) or the power of the High Court to grant the requisite certificate under or for the same to judgment, final order or sentence of conviction passed or maintained by the High Court.

State v. *Ramlesh Hari* (1) over-ruled, *State* v. *Tula Ram* (2) affirmed, *State of Orissa* v. *Minaketan Patnaik* (3) dissented from.

State v. Ram Krishna Ganpatrao (4) distinguished, and *State of Madras* v. *Guruiah Naidu* (5) applied.

Supreme Court Criminal Miscellaneous no. 69 of 1961, for leave to appeal to the Supreme Court under articles 134(1)(c) Constitutions of India, in Government appeal no. 774 of 1959.

The facts appear in the judgment.

Deputy Government Advocate for the State.

The judgment of the Court was delivered by—

DESAI, C. J.—This application by the State for a certificate under Article 134(1)(c) of the Constitution, that

(1) 1955 A.L.J. 827.
(2) 1960 A.L.J. 361.
(3) A.I.R. 1953 Orissa 189
(4) A.I.R. 1954 S.C. 20.
(5) A.I.R. 1956 S.C. 158.

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the case is a fit one for appeal to the Supreme Court, is laid before us in accordance with the orders of the Bench by which it was heard. The opposite party was tried before a Magistrate for the offence of section 14(2) of the Employees Provident Fund Act read with paragraph 76 of the Provident Fund Scheme. The Magistrate convicted him, but on appeal the Sessions Judge acquitted him. The State preferred an appeal from the acquittal which was dismissed by our brothers, VISHNU DATTA BHARGAVA and TAKRU. The question raised in the appeal before them was of the effect of the number of workmen employed in a factory falling below fifty after the scheme had come into force. It was held by them that after the number of workmen employed in a factory by the opposite party fell below fifty, he was not bound to implement the scheme and could not be convicted under section 14(2) of the Act. The State wants a certificate under Article 134(1) (c) on the ground that the question of law decided by our learned brothers is of sufficient importance to justify its being raised before the Supreme Court.

Article 134(1) of the Constitution is as follows:

> "An appeal shall lie to the Supre Court from any judgment, final order or sentence in a criminal proceeding of a High Court . . . if the High Court—
>
> (a) has on appeal reversed an order of acquittal of an accused person and sentenced him to death; or
>
> (b) has withdrawn for trial before itself any case from any court subordinate to its authority and has in such trial convicted the accused person and sentenced him to death; or
>
> (c) certifies that the case is a fit one for appeal to the Supreme Court:"

is to be noted that there are two matters dealt with this provision: (1) of the maintainability of an appeal the Supreme Court and (2) the granting of a certifi- te Clauses (*a*) and (*b*) grant to an accused, who has en convicted and sentenced to death by a High Court, absolute right of appeal to the Supreme Court, while ause (*c*) gives a right on the basis of a certificate of ness for appeal granted by the High Court.

The question whether an appeal lies to the Supreme ourt under Article 134 or not is within the sole juris- ction of the Supreme Court; a High Court has abso- tely no jurisdiction to decide this question. In fact a rtificate granted by the High Court does not bind the upreme Court and their Lordships can in a proper se hold that the certificate should not have been grant- d by the High Court. All that the High Court has to o is to *prima facie* satisfy itself that the order sought be appealed from is one contemplated by the first ause of Article 134 and then to see whether it also nswers the requirements of sub-clauses (*a*), (*b*) or (*c*) of rticle 134(1). If the order sought to be appealed from not a judgment, final order or sentence in a criminal roceeding, the High Court cannot grant a certificate nder clause (*c*) of Article 134(1) however erroneous the udgment may be. A High Court does not come into he picture at all when an appeal is filed under clause *a*) or clause (*b*), but it does when an appeal is to be filed nder clause (*c*) because an appeal cannot be filed unless he High Court grants a certificate of fitness for appeal which the High Court can only do if it is satisfied not nly with regard to the merits of the appeal but also vith regard to the fact that it is one of the orders con- emplated by Article 134(1).

In this view it would not be necessary for us, except o the limited extent which we have mentioned above, o decide whether an appeal lies under clause (*c*) from

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an order of acquittal passed, or maintained on appeal, by a High Court. But if we were to decide it, we would have no hesitation in deciding it in the affirmative. Article 134 grants a right of appeal from "any judgment, final order or sentence". The words are as wide as they could be. The Article makes no distinction whatsoever between one judgment and another or one final order and another or one sentence and another; an appeal lies from every judgment or every final order or every sentence, and is appealable to the Supreme Court if the condition laid down in clause (*a*) or (*b*) or (*c*) is fulfilled. When a High Court acquits an accused on an appeal by him or maintains his acquittal by a subordinate court on an appeal by the State Government or the complainant under section 417, Criminal Procedure Code the judgment, though of acquittal, is a "judgment" within the meaning of Article 134 and appealable to the Supreme Court. The words used in the Article being of the widest amplitude, it is not open to us to restrict their scope by saying that the "judgment" or "final order" must be a judgment or final order of conviction or maintenance of conviction. It is also not justifiable for us to reduce their scope in this manner.

In the case of *State of Orissa* v. *Minaketan Patnaik* (1) JAGANNADHADAS, C. J. was inclined to the view that a High Court has no jurisdiction to grant a certificate referred to in clause (*c*) in a case of acquittal. He referred to the fact that an appeal against acquittal is not an ordinary feature of the English Law and that the Legislature of India has made a departure from it by specially providing for an appeal by the State Government from acquittal under section 417 and observed:

> "It appears to me, therefore, quite clear that it would be against the policy of the legislature to construe Article 134(1)(*c*) of the Constitution as

(1) A.I.R. 1958 Orissa 169.

> permitting the High Court to grant leave to appeal as against the judgment of acquittal confirming the acquittal."

With great respect we find ourselves unable to agree with the reasoning of the learned Chief Justice. An appeal is, as is well known, a matter of statute, and no appeal lies, whether from conviction or from acquittal, without a statutory provision. If in English Law there is an appeal from conviction only, it is because there is statutory provision for an appeal from conviction and no statutory provision for an appeal from acquittal. The Indian legislature has expressly taken a different line from the British Parliament and enacted section 417, Criminal Procedure Code. Not only are we not governed by statutes enacted by Parliament but also, after the enactment of section 417, Criminal Procedure Code, it is not permissible to contend that an appeal from acquittal is foreign to the Indian legislature's policy. The learned Chief Justice did not, however, expressly decide that no appeal from acquittal lies to the Supreme Court under clause (c) and dismissed the application for a certificate of fitness for appeal on merits. This will be clear from the following observations made by him at page 165:

> "Whether or not my view on this aspect is correct, I am inclined to think that in this case there are no sufficient grounds for certifying that this is a fit one for granting leave".

We find no support for the view that a judgment of acquittal by a High Court is not a "judgment" within the meaning of Article 134(1).

Coming to the question of a High Court's certifying that the case is a fit one for appeal, we find that it involves two questions: one of jurisdiction or power and the other of merits. The two questions are distinct from

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each other but sometimes have been confounded with each and some High Courts have, while discussing the jurisdiction to grant the certificate, gone into the merits of the application for a certificate and dismissed it. As regards the jurisdiction, it can hardly be doubted that a High Court can grant a certificate of fitness for appeal from "any judgment, final order or sentence in a criminal proceeding". Since the appeal is to lie from "any judgment, final order or sentence", the High Court can grant a certificate of fitness for appeal from "any judgment, final order or sentence". In other words, any judgment, whether of conviction or of acquittal, can be certified by a High Court to be a fit one for appeal. In the case of *Minaketan Patnaik* (1) referred to above and in *State* v. *Tula Ram* (2) it was pointed out that the words used in Article 134 are wide enough to cover a certificate being granted by a High Court in any case, including one of acquittal. There is nothing in clause (c) to suggest that only a case of conviction can be said to be fit for appeal to the Supreme Court. If an appeal does lie from acquittal by a High Court, a judgment of acquittal can be certified by a High Court to be a fit one for appeal. A fit case includes not only one in which an accused convicted but also one in which he is acquitted by the High Court or his acquittal by a subordinate court is maintained by it on appeal. Clauses (a) and (b) are fundamentally different from clause (c); the former give an absolute right of appeal to the accused and deal with a case in which he is tried and sentenced to death by the High Court itself. There is nothing in common between them and clause (c), which gives an independent right to appeal. Clause (c) deals with a case in which there is no absolute right of appeal, that is, with every case barring a case in which an accused is tried and sentenced to death by the High Court itself.

(1) A.I.R. 1958 Orissa 169. (2) 1960 A.L.J. 361.

The words "the case" occurring in clause (*c*) are not so ambiguous as to require any assistance from clauses (*a*) and (*b*) in their interpretation. There is no scope at all for the application of the principle of *ejusdem generis*, which was invoked by a Bench of this Court in *State* v. *Kamlesh Hari* (1). With great respect to our learned brothers, who decided the case, we may point out that there are no genus and species in Article 134—no particular words (species) followed by a word of *generam import* (*genus*). An appeal under clause (*c*) differs so fundamentally from an appeal under clauses (*a*) and (*b*) that the relationship of genus and species cannot exist between clause (*c*) on one side and clauses (*a*) and (*b*) on the other, and without such a relationship the application of the doctrine of *ejusdem generis* is impossible. Therefore, the circumstance that clauses (*a*) and (*b*) deal with an appeal by a convicted person is not of any relevancy in deciding what is meant by "the case" in clause (*c*). We have no doubt that a High Court is competent to grant the certificate referred to in clause (*c*) from its judgment of acquittal or maintenance of acquittal on appeal.

This application was referred to a larger Bench by our brothers before whom it was laid, on account of a conflict between *State* v. *Kamlesh Hari* (1) and *State* v. *Tula Ram* (2). We respectfully dissent from the decision in the case of *Kamlesh Hari* and agree with the decision in *State v. Tula Ram* (2). The learned Judges who held in the cases of *Kamlesh Hari* (1) and *Minaketan Patnaik* (3) that a High Court has no power to grant a certificate referred to in clause (c) in a case of acquittal, thought that that was the decision of the Supreme Court in *State* v. *Ram Krishna Gaupatrao* (4). The Supreme Court dealt with an appeal filed with special

(1) 1955 A.L.J. 827.
(2) 1960 A.L.J. 361.
(3) A.I.R. 1958 Orissa. 169.
(4) A.I.R. 1951 S.C. 20.

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leave by the State of Madhya Pradesh from an acquittal order passed by the High Court of Nagpur on appeal. The question whether a High Court has power to grant a certificate referred to in clause (c) when it acquits the accused (or maintains his acquittal under section 417, Criminal Procedure Code) did not arise before the Supreme Court and was not answered by it. The question dealt with by it was whether the appeal should be allowed or not and in dealing with that question MAHAJAN, J. (as he then was) observed:

> "This appeal is before us by special leave. Article 134 of the Constitution permits an appeal to this Court from any judgment, final order or sentence in a criminal proceeding of a High Court in the territory of India if the High Court has on appeal reversed an order of acquittal of an accused person and sentenced him to death. It does not provide for an appeal from a judgment, final order or sentence in a criminal proceeding of a High Court if the High Court has on appeal reversed an order of conviction of an accused person and has ordered his acquittal. In other words, there is no provision in the Constitution corresponding to section 417, Criminal Procedure Code and such an order is final subject, however, to the overriding powers vested in this Court by Article 136 of the Constitution."

We are constrained to observe that these observations have been misunderstood or misapplied. What the learned Judge meant by saying that Article 134 does not provide for an appeal from a judgment of acquittal passed by a High Court on appeal is that there is no such provision in express words as there is for an appeal by an accused against his conviction. Clauses (*a*) and (*b*) give an accused, who is convicted and sentenced by the High Court, an absolute right of appeal to the Supreme

Court. Section 417, Criminal Procedure Code also gives State Government an absolute right of appeal to the High Court from an order of acquittal by a subordinate court. There is no similar provision which gives an absolute right of appeal to the Supreme Court from acquittal by a High Court. The learned Judge did not consider at all the provision of clause (*c*) and did not decide that a High Court has no jurisdiction to grant a certificate of fitness for appeal from its order by which it acquits an accused on appeal or maintains his acquittal on appeal under section 417. These observations were considered and explained by the Supreme Court in *State of Madras* v. *Gurviah Naidu &Co.* (1). The High Court of Madras on appeal had set aside the conviction of an accused and acquitted him. The State of Madras obtained from the High Court a certificate of fitness for appeal under Article 134(1) (*c*) and preferred an appeal from the acquittal to the Supreme Court. The Supreme Court allowed the appeal, set aside the acquittal and restored the conviction. Its attention was drawn to the above-quoted observations and it was contended before it that the appeal was not maintainable under Article 134(1) (*c*). The learned Judges pointed out that decision in the case of *Ramkrishna Ganpatrao* (2) was not a decision of a Constitution Bench, that it was given in an appeal filed with special leave granted by it and that the observations were "obviously made to emphasise that this Court should not, in an appeal by special leave, interfere with an order of acquittal passed by the High Court merely for correcting errors of facts or law". The learned Judges did not hear arguments on the scope of Article 134(1) (*c*) and expressly refrained from deciding whether a High Court has jurisdiction to grant a certificate mentioned in clause (*c*) or not, because even if the

(1) A.I.R. 1956 S.C. 158. (2) A.I.R. 1954 S.C. 20.

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appeal could be said to be not maintainable under Article 134(1) (c) it could be maintained on special leave. It is clear from this decision of the Supreme Court that it left the question of the maintainability of appeal from a High Court's order of acquittal on a certificate mentioned in clause (c) undecided and made it clear that it was not decided also in the case of *Ramkrishna Ganpatrao* (1). If it had been already decided in the case of *Ramkrishna Ganpatrao* (1) there was no question of its being left open by the Supreme Court. After this decision of the Supreme Court it is not possible to say that the Supreme Court has held that no appeal from acquittal lies under Article 134(1) (c).

In the case of *Minaketan Patnaik* (2) PANIGRAHI, J., though expressing entire concurrence with the judgment of the learned Chief Justice, said that the case was not a fit one for appeal to the Supreme Court. Thus he also, though being inclined to the view that a High Court has no power to grant a certificate referred to in clause (c), rejected the application for such a certificate on merits. NARASIMHAM, J., who was the third member of the Court, definitely held that such a certificate can be granted by a High Court. There is thus very little support to be had from the decision in this case for the proposition that a High Court has no jurisdiction to grant a certificate referred to in clause (c).

In the case of *Kamlesh Hari* (3), the learned judges did observe at page 889 that the above-quoted observations in the case of *Ramkrishna Ganpatrao* (1) apply in a case in which an application is made for a certificate mentioned in clause (c) from an order of acquittal. With great respect we disagree and find that the observations have no bearing on the question. We are not certain if the question of jurisdiction was not confused with that of merits.

(1) A.I.R. 1954 S.C. 20 (2) A.I.R. 1953 Orissa 169
(3) 1955 A.L.J. 827.

The view that we take is supported by the view taken by ROY and UNIYAL, JJ., in the case of *Tula Ram*. We respectfully agree with their observation that the considerations relevant for section 417, Criminal Procedure Code, are not relevant when a High Court has to grant a certificate mentioned in clause (*c*) from an acquittal.

We, therefore, hold that a High Court has jurisdiction to certify that the case decided by it resulting in acquittal of the accused or maintenance of his acquittal by a subordinate court is a fit one for appeal to the Supreme Court.

Coming to the merits of the application, we are satisfied that this is not a fit case for appeal to the Supreme Court at all. The question of law that is involved in the appeal is under consideration before a Full Bench of this Court and would be authoritatively decided, as far as this Court is concerned, soon. In view of this fact we do not consider that it should be allowed to be raised before the Supreme Court. If the Full Bench decides it against the State it will be open to the State to file an appeal to the Supreme Court from it either on a certificate or by special leave.

In the result we dismiss this application.

Application dismissed.

APPELLATE CIVIL

Before the Hon'ble M. C. Desai, Chief Justice and Mr. Justice Dwivedi.

K. K. BAKSHI, DR. (APPELLANT)

v.

RAM AUTAR (RESPONDENT)

1961
May, 11

Transfer of Property Act, 1882, *s.* 106 *as amended by U. P. Civil Laws (Reforms and Amendment) Act,* 1954, *if has retrospective effect and if affects the lease given in* 1950.

The question that arose for determination in the appeal was that if the U. P. Civil Laws (Reforms and Amendment Act) of 1954 amending s. 106 of the Transfer of Property Act did not have retrospective effect and did not affect the lease given in 1950 terminable at that time by a notice of 15 days expiring with the end of a month of the tenancy.

The Court, *held*,

(i) that the tenancy being from month to month for an indefinite period it commenced on the first of a month and ended on the last of the month, it again commenced on the first day of the next month and terminated on its last day and so on.

(ii) that the only right that the appellant possessed on 22nd November, 1954, just before the enactment of the amending act, was that his monthly tenancy for the month of November, 1954 would not be terminated except by a notice expiring on the last day of November, 1954, but he had no right whatsoever in respect of tenancies for future months.

(iii) that the U. P. Civil Laws (Reforms and Amendment Act) of 1954, which did not have retrospective operation, left only the right possessed on 22nd November, 1954, intact and could govern the accrual of similar right in future.

(iv) that the notice to quit was legal and the suit was rightly decreed.

Second Appeal no. 125 of 1960, from a decree of Chhatrasal Singh, Additional Civil Judge, Banda, dated the 18th December, 1959, in Civil Appeal no. 228 of 1958 (Original Suit no. 772 of 1956).

The facts appeal in the judgment.

Gopal Behari, for the appellant.

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K. K. BAKSHI v. RAM AUTAR

The judgment of the Court was delivered by—

DESAI, C. J:—This is an appeal by a tenant from a decree passed against him for his ejectment from a house. There was a decree passed against him for arrears of rent also, but that decree is not challenged before us.

The appellant's tenancy commenced in some month in 1950; it was a tenancy for an indefinite period. When it was created, the law in force was that it would be a lease from month to month, terminable, on the part of the respondent lessor, by 15 days' notice expiring with the end of a month of the tenancy. A month of the tenancy commenced on the first of the month and expired on the last day of it. Therefore, according to the law then in force, the tenancy of the appellant could be terminated in any month by a 15 days' notice expiring with the last day of the month. In 1954 the U. P. Legislature enacted the U. P. Civil Laws (Reforms and Amendment) Act no. XXIV of 1954, amending section 106 of the Transfer of Property Act, which alters the law stated above in its application in the State of Uttar Pradesh by omitting the words "expiring with the end of a month of the tenancy" and substituting the words "30 days' notice" in place of the word "15 days' notice". We are not concerned with the second amendment and it will be ignored. On 22nd october, 1956 the respondent gave a notice to the appellant terminating his tenancy with effect from 24th November, 1956 and requiring him to vacate on or by that date. The notice was served upon the appellant on 24th October, 1956 and, therefore fulfilled the requirement of 30 days' notice contained in section 106 as amended by the U. P. Act. The appellant did not quit. He also did not pay rent for several months in spite of the service upon him of a notice requiring him to pay it. Consequently the respondent filed a suit for his ejectment and for recovery

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of arrears of rent and it has been decreed by the courts below.

The only ground taken by the appellant in this appeal is that the U. P. Act did not have retrospective effect, i.e. did not affect the lease given to him in 1950 terminable by a notice expiring with the end of a month of the tenancy, and hence the notice to quit given by the respondent terminating the tenancy on 24th November, 1956 was invalid. The U. P. Act came into force on 22nd November, 1954 and the notice to quit was given about two years later. It was in accordance with the provisions of section 106 as it stood amended by the U. P. Act; it gave 30 days' notice. The contention of the appellant's counsel is that he had the vested right to remain in possession in any month up to the last day of it and that this vested right was not taken away by the U. P. Act. He relied upon section 3 of the U. P. Act laying down that any amendment made by it would not affect any right already acquired. After having heard *Sri Gopal Behari* we find that no right had been acquired by the appellant on or by 22nd November, 1954, which was, if at all, affected by the notice to quit served upon him on 24th October, 1956. Since the tenancy was for an indefinite period, it was a tenancy from month to month; the tenancy commenced on the first of a month and ended on the last day of the month, it again commenced on the first day of the next month and terminated on its last day, it again commenced on the first day of the third month and terminated on its last day and so on. The only right that the appellant possessed on 22nd November, 1954 just before the enactment of the U. P. Act was that his monthly tenancy for the month of November, 1954 would not be terminated except by a notice expiring on the last day of November, 1954; he had no right whatsoever in respect of tenancies for future months, such as a tenancy for the month of

October, 1956. The U. P. Act, which did not have retrospective operation, left only the right possessed on 22nd November, 1954 intact, and could govern the accrual of similar rights in future. The notice served on 24th October, 1956 affected whatever right he might have acquired on 1st October, 1956; but that right did not exist on 22nd November, 1954 and was consequently not saved by section 3 of the U. P. Act. The notice did not take away the right acquired on 22nd November, 1954.

Sri Gopal Behari did not rely upon any other provision for the saving of his socalled right. Even if section 6 of the General Clauses Act had been relied upon, it would not make any difference because its language is similar to that of section 3 of the U. P. Act. Both the Acts save vested rights, that is, rights that were acquired before the Amendment Act came into force.

We hold that the notice to quit was legal and that the suit was rightly decreed against the appellant, and dismiss this appeal with costs.

A request was made by *Sri Gopal Behari* that we should prohibit the execution of the decree for a short period. We do not think we have the jurisdiction to prohibit the execution of the decree even temporarily; the respondent acquired a right to take possession of the house on 24th November, 1956 and we have no power to deprive him of that right. More than four years have passed since that right accrued in favour of the respondent and it would be most unjustifiable, even if we had the power, to stay the execution of the decree for some time. The appellant had enough notice to arrange for another accommodation if he was so minded. An executing court cannot go behind the decree. We, therefore, refuse to prohibit the execution of the decree for any period. For similar reasons we must refuse to modify

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the decree by postponing the right to delivery of possession for a short period. The respondent acquired the right to immediate possession on 24th November, 1956 and we would act illegally, and in the above-mentioned circumstances most unjustifiably, if we were to take away something from it. He must, therefore, get the decree for immediate possession, and must be allowed to execute it at once. The prayer is consequently rejected.

Appeal dismissed.

(FULL BENCH) CRIMINAL REVISION

Before the Honourable M. C. Desai, Chief Justice, Mr. Justice J. Sahai and Mr. Justice B. Dayal.

PREM DAS

v.

STATE

1961

May, 15

Adulteration of milk—*Sale of a mixture of cow and buffalo milk—Absence of a prescribed standard for the mixture—Adulteration, how adjudged—Scope of duty of public analyst defined—Prosecution for second offence—Trial as a summon's case, legality of—Prevention of Food Adulteration Act,* 1954, *ss.* 2(i)(1), 7 *and* 16(1)(ii)—*Prevention of Food Adulteration Rules,* 1955 *vr. A.* 11, 01, 01, *A.* 11. 01, 01, *A.* 11. 01. 02.

Where there is no standard prescribed for any article of food, it is the duty of the court to fix or determine the same.

Morston v. *Loney* (1) applied.

Although the law has prescribed a standard for cow and buffalo milk separately there is no such standard for a mixture of the two where a proportion of the two in the mixture is known, the prescribed standard for that mixture may be worked out by a simple arithmatical calculation. Even where the proportion is not known it may be possible to adjudge adulteration in certain cases, e.g. where the quantity of milk fat or non-fatty solids is less than the minimum prescribed for cow milk it amounts to or can only be the result of adulteration.

Municipal Board, Ghaziabad v. *Jaswant Rao* (2) *Municipal Board, Kanpur* v. *Badloo* (3) over-ruled, *Chandrika Prasad* v. *State* (4) affirmed.

It is time the public analyst clearly understood the scope of his duty and confined himself to what lay within it. The public analyst should state in his report merely the result of his analysis and leave it to the Court to determine what is the prescribed standard for the particular article of food and whether the quality or purity of the sample falls below the prescribed standard, and that if he can determine the quantity of water in the sample without determining the quantity of solids he should state the quantity of water actually found in the sample,

(1) 1960 A.L.J. 361.
(2) Criminal Appeal no. 1940 of 1960 decided on.
(3) 1960 A.L.J. 318.
(4) Criminal Revision no. 319 of 1960, decided on 15th Nov., 1960.

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leaving it to the Court to determine how much, if at all was added water

English law referred to.

The second offence punishable under s 16(1)(ii) of the Act being liable to the maximum sentence of two years' imprisonment must be tried as a warrant case. The trial of such offences according to the procedure for summons case is illegal but curable under s. 537 of the Code of Criminal Procedure except where prejudice has been caused to and established on behalf of the accused.

Criminal Revision no. 817 of 1960 (connected with Criminal Revisions nos. 1581, 1708, 1927 and 1950 of 1960) from an order of Achutanand Pandey, Temporary Sessions Judge of Bulandshahr, dated the 18th April, 1960, in Criminal Appeal no. 444 of 1959.

The facts appear in the judgment.

P. N. Misra, for the applicant.

A. G. A., for the State.

The judgment of the Court was deliverd by—

DESAI, C. J.:—The applicant challenges his conviction under section 16 of the Prevention of Food Adulteration Act and the sentence imposed thereunder. In the connected revisions the applicants challenge their convictions under the same provision and the sentences imposed thereunder. It has been found as a matter of fact that the applicant sold a mixture of buffalo milk and cow milk, a sample of which was taken by an Inspector and sent for chemical analysis. The public analyst reported that the sample contained 5.9 per cent milk fats and 7.0 per cent non-fatty solid and that it contained 7.20 per cent added water. He treated the sample as if the two kinds of milk were mixed in equal proportions. It is on the basis of this report of the public analyst that the sample has been found by the court below to be adulterated and the applicant has been convicted under section 16 of the Act for infringement of provisions of section 7, which prohibits sale of

adulterated food. The case against the applicant was tried as a summons case and after the complaint made by the Inspector was read over to him he was asked to plead and he pleaded guilty. Previous to the conviction in this case he had been convicted for another offence under the same Act, he had submitted himself to the conviction and the sentence. On account of the previous conviction he has been sentenced under section 16(1) (ii) as for a second offence.

The first question that arises is whether it has been proved that the milk that the applicant sold was adulterated or not. An article of food becomes an adulterated article of food in various ways mentioned in section 2(1) of the the Act. For instance, if its quality or purity falls below the prescribed standard, or if its constuents represent any quantities which are in excess of the prescribed limits of variability, or if any inferior or cheaper substance has been substituted wholly or in part for it so as to affect injuriously its nature, substance or quality it is adulterated. Before one deals with the question whether there is adulteration or not one must decide what is the article that is under consideration. In this case the article under consideration is a mixture of buffalo milk and cow milk; the applicant admittedly sold it as a mixture of cow milk and buffalo milk; he did not profess to sell pure buffalo milk or pure cow milk. He would be guilty of infringement of section 7 only if he sold the mixture in an adulterated condition, i.e., if the quality or purity of the mixture fell below the prescribed standard, or if any inferior or cheaper substance had been substituted in it wholly or in part so as to affect injuriously its nature, substance or quality. Merely because it is a mixture it does not become an adulterated article. If he sold it as buffalo milk it can be said to be adulterated because it was mixed with cow milk which is inferior

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or cheaper than buffalo milk. But he sold it as a mixture, and in order to commit the offence of adulteration he must have adulterated the mixture with something inferior or cheaper or injurious.

The mixture, as such, would be adulterated if its quality or purity fell below the prescribed standard, or if for it any cheaper substance was substituted or if it was not of the nature, substance or quality demanded by the purchaser and was to his prejudice, or was not of the nature, substance or quality which it purported or was represented to be. If the proportion of buffalo milk and cow milk was 1 : 2 but the applicant represented that it was half and half it could be said to be adulterated because it was not of the nature, substance or quality which it was represented to be. Neither in this case nor in any of the connected cases has the milk been found to be adulterated on this ground. In this case there is no evidence of the proportion in which buffalo milk and cow milk were mixed together; in some of the connected cases the accused represented that the two kinds of milk were mixed in a certain proportion but it has not been found on analysis that they were not mixed in that proportion. Nor is it the case in any of the Revision applications that the applicant sold the mixture when the customer demanded buffalo milk, or that any injurious article was mixed with it. All the applicants have been convicted on the ground that the milk did not conform to the prescribed standard. The standards for the two kinds of milk are prescribed in Appendix B to the Rules framed by the Central Government in exercise of the powers conferred by section 23 of the Act. Section 23(1) (*b*) authorizes the Central Government to make rules defining the standard of quality for, and fixing limits of variability permissible in respect of, any article of food. Rules A. 11.01 etc. state the standards prescribed for

milk and milk products. Rule A. 11.01 simply defines "milk". Rule A. 11.01.01 prescribes standards for cow milk; every sample of cow milk in Uttar Pradesh must contain not less than 3.5 per cent of milk fats and not less than 8.5 per cent non-fatty solids. The standards prescribed for buffalo milk in Uttar Pradesh in rule A. 11.01.02 are that it must contain not less than 6 per cent of milk fats and not less than 9 per cent of non-fatty solid. It is to be noticed that the standards prescribed under the Rules are only in respect of milk fats and non-fatty solids and not in respect of water. A sample of milk will be deemed to be adulterated if the milk fats are less than the prescribed minimum or if the non-fatty solids are less than the prescribed minimum; no maximum for water is prescribed at all and whether milk is adulterated within the meaning of section 2(1) (i) or not does not at all depend on the quantity of water. Rule 44 of the Rules prohibits sale of "milk which contains any added water"; therefore sale of milk, to which water has been added, is an offence punishable under section 16(1) (*a*), regardless of the question of adulteration. If a person is accused of selling milk with added water in contravention of rule 44 it will be necessary to prove that water was added to milk that was being sold, and this can be done either by direct evidence of an eye-witness, or by the evidence of an expert, who, on chemical analysis, finds that water has been added. When however a person is prosecuted not for infringement of rule 44 but for infringement of section 7, which prohibits sale of adulterated food, the question is whether the article of food is adulterated or not. Again, it can be proved to be adulterated by showing that water, which is an inferior and cheaper substance than milk, is added to it and the addition is to the prejudice of the purchaser, and this would require direct evidence of a witness

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who has seen water being added or an expert opinion to the effect that water has been added. Adulteration can also be proved by showing that the quality or purity falls below the prescribed standard, and usually adulteration is sought to be proved in this manner. In this and other cases milk is sought to be proved to be adulterated not on the ground that water has been added but on the ground that its quality and purity falls below the prescribed standards. In such a case the public analyst has only to consider the standards prescribed in Rules A. 11.01 etc. and should not go out of his way to find the percentage of added water. It is not known that he can find the percentage of added water independently of the quanitities of the milk fats and non-fatty solids found present in the milk analysed by him. Presumably he finds the quantity of water only by deducting the quantities of milk fats and non-fatty solids from the weight of the sample analysed by him. If so, it is quite useless because his finding that the milk fats, or the non-fatty solids, or both are less than the prescribed minimum itself is enough for holding that the milk is adulterated, and it is mere repetition to say that it is adulterated because water has been added to it. Unless he can find the quantity of added water without determining the quantities of the milk fats and the non-fatty solids, he should not state anything about added water in his report.

No standard is prescribed for a mixture of cow milk and buffalo milk, but this does not mean that a mixture of the two milks can never be found on chemical analysis to be below the prescribed standards. When the two milks are mixed together, they retain their individual characteristics; what results is a mixture and not a compound having characteristics entirely different from those of either of the two ingredients. When a person sells mixed cow and buffalo milk he in fact sells cow

milk and buffalo milk, and if either or both can be found to be below the prescribed standard, he commits the offence of selling an adulterated article of food. It is not essential to prove which of the two milks that he sells is adulterated; it is sufficient if it is proved that either one or the other is adulterated (or both are adulterated) because a person can always be convicted in the alternative. It is not impossible to prove that either one or the other is adulterated. If the proportion in which the two milks are mixed together is known, one can always determine the minimum quantity of milk fats and the minimum quantity of non-fatty solids that should be present in the mixture, and if the quantity of milk fats or the quantity of non-fatty solids is less, it means that the mixture is below the standard. For instance, if in a mixture of 100 lb. the proportion of buffalo milk and cow milk is 4 : 1, it must have at least 5.5 lb. $\left(\frac{80\times6}{100}+\frac{20\times3.5}{100}\right)$ of milk fats and 8.9 lb $\left(\frac{80\times9}{100}+\frac{20\times8.5}{100}\right)$ of non-fatty solids and if the mixture has less of either, it is adulterated. It may not be ascertained which of the two milks is adulterated but this is not required at all. If the quantity of the milk fats or of the non-fatty solids is more than the total of what they should be according to the prescribed standard, the mixture may still be adulterated but the adulteration cannot be proved because it may be that the deficiency below the prescribed minimum in one kind of milk is made up by an excess in the other kind of milk. But, if the quantity of milk fat or non-fatty solids is less than the total of the prescribed miniman, the mixture must be adulterated, because if each of the two milks had more than the prescribed minimum, the mixture must necessarily have had more than the aggregate of the prescribed minima. In such a case it is erroneous to say that the mixture cannot be proved to be adulterated because there is no standard prescribed for a mixture. There can be no

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standard prescribed for a mixture because there is no need for it; the standard depends upon the proportion in which the two kinds of milk are mixed together, and it is a matter of simple arithmetical calculation to find out what should be the minimum quantities of the milk fats and of the non-fatty solids. When no standard has been fixed, the court has to fix a stardard, as pointed out in *Marston* v. *Loney* (1) and the Court should fix a standard for the particular mixture.

Even if the proportion in which the two milks are mixed is not known, the mixture can in certain circumstances be proved to be below the prescribed standard. If the total quantity of milk fats or of the non-fatty solids is less than the prescribed minimum for cow milk, it is below standard. The prescribed minima for cow milk are lower than those for buffalo milk. If buffalo milk is added to cow milk, the quantities of the milk fats and of the non-fatty solids must necessarily be more than if equal quantity of cow milk were added instead of buffalo milk. Thus, by addition of buffalo milk the percentage of the milk fats or of the non-fatty solids increases but can never decrease and if a mixture has less percentage of the milk fats or non-fatty solids than the prescribed minimum, it is adulterated. In the present case the quantity of the milk fats was more than the minimum prescribed for cow milk, though less than the minimum prescribed for buffalo milk, but the quantity of the non-fatty solids was less than the minimum prescribed for cow milk and either the buffalo milk or the cow milk contained in the mixture of both kinds of milk were adulterated and the applicant was guilty. Whatever might have been the proportion in which the two kinds of milk were mixed, the total quantity of the non-fatty solids could not have been less than 8.5 per cent, if neither of them was adulterated. Surely, he could

(1) 1955 Cr. L. R. 798.

not escape conviction by simply mixing an adulterated article of food with another article; any other view of the case would result in complete circumvention of the beneficial provisions of the Act; one would have only to mix an adulterated article of food with another and then claim that since there is no standard prescribed for a mixture of the two articles of food, the mixture can never be proved to be adulterated on the ground that its quality or purity falls below the prescribed standard. In *Municipal Board, Ghaziabad* v. *Jaswant Rao* (1) a different view was taken. The facts in that case were that Jaswant Rao sold a mixture of the two kinds of milk, which on analysis was found to contain 5.6 per cent. milk fats and 7.5 per cent non-fatty solids and 17 per cent. added water. The proportion in which the two kinds of milk were mixed was not known. Though the quantity of milk fats was more than the prescribed minimum for cow milk, the quantity of non-fatty solids was less than the prescribed minimum for cow milk and the mixture was undoubtedly adulterated because the quality or purity of one milk or the other fell below the prescribed minimum. Our learned brothers, however, held that the mixture was not proved to be below the prescribed standard. They rejected the evidence of the expert about the quantity of added water because he did not state in the report how much natural water he had found. With great respect to our learned brothers we may point out that water is nothing but the chemical compound H_2O. that there is no chemical difference between natural water to be found in milk and water that may be added to it for adulteration and that consequently no expert can find how much water was, what our learned brothers call, "natural water", and how much added for adulteration. What he can do is to find the total quantity of water, but for the reasons given

(1) Criminal appeal no. 1940 of 1960 decided on 16th March, 1961, by UNIYAL and *Ramabhadran*, JJ.

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earlier it would be futile for him to do so. We, however, fully agree with our learned brothers that an expert in his report should not give his opinion about the quantity of added water; it is for the Court to decide whether water has been added artificially or not. In the instant case also the expert has stated in his report that the sample of milk contained so much added water without stating what was the quantity of water actually found by him in it. It is the function of the court to determine in accordance with the law what is the maximum quantity of water permissible in unadulterated milk and then decide whether the sample contained more than it or not. In *Bakewell* v. *Davis* (1) CHARLES, J., said at page 303 that the proper course for an analyst to adopt is to write down the result of his analysis. A statement of an analyst that the sample contained 13 per cent. of excess water over and above what was allowed by the Act was adversely criticised in *Newby* v. *Sims* (2) DAY, J., observing at page 482:

> "In the present case all that the analyst states in his certificate is that he finds the excess of water to be 13 per cent. over and above that which is allowed by Act of Parliament. It comes to this, that he takes upon himself to act as the judge of law and fact; whereas those questions are for the magistrates to determine. To enable us to act on the certificate we must know what the analyst finds in fact. The statement as to an excess of 13 per cent. is quite insufficient, for there is no statement above what amount in fact the excess is. The analyst ought to determine as a matter of fact how much water there is in the pint of rum, and, as he has not done so, the certificate is not in such a form as to amount to evidence on which the magistrates could act."

The analyst's certificate to the effect that the sample of milk contained "5 per cent. of added water" was held

(1) (1892) 1 Q.B. 356. (2) (1894) 1 Q.B. 478.

to be bad in *Fortune* v. *Hanson* (1) HAWKINS, J., observing at page 205:

> "A certificate must state such facts as will enable the magistrates themselves to come to the conclusion whether the article of food in question had, or had not, been adulterated. . . To say merely that a sample of milk contained 5 per cent. of added water is only to state the analyst's own opinion that water has been added. The Magistrates have to exercise their own judgment on the question. They may adopt one standard; the analyst another. They ought to be informed by the certificate what was the total percentage of water found in the sample."

We may also refer to *Bridge* v. *Howard* (2) in which the analyst said in his certificate that the sample of milk contained 6 per cent. of added water and that his opinion was based on the fact that it contained so much per cent. of the non-fatty solids as against the prescribed minimum of 8.5 per cent. and it was held that the certificate was good. The certificate was held to be good because of the statement contained in it that the percentage of the non-fatty solids was less than the prescribed minimum. The certificate was bad in respect of the statement that the sample contained 6 per cent. of added water but, as explained earlier, the statement being based on the quantity of the non-fatty solids was altogether futile and, therefore, the defect in the statement was material. We have taken pains to discuss this matter at length because we find that usually the public analyst mentions in his report the percentage of added water though his opinion is based only on the quantities of the milk fats and the non-fatty solids found in the sample and that he mentions not the total quantity of water found by him in the sample but his opinion as to how much of it was natural and how much added for adulteration. It is

(1) L. R. (1896) 1 Q.B. 202. (2) L.R. (1897) 1 Q.B. 80.

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time the public analyst clearly understood the scope of his duty and confined himself only to what lay within it. We trust that in future the public analyst will state in his report merely the result of his analysis and leave it to the court to determine what is the prescribed standard for the particular article of food and whether the quality or purity of the sample falls below the prescribed standard, and that if he can determine the quantity of water in the sample without determining the quantity of the solids he will state the quantity of water actually found in the sample, leaving it to the court to determine how much, if at all, was added water. Our learned brothers after rejecting the evidence about the percentage of added water observed, "In the absence of any standard prescribed by the rules. . . . with respect to the quantity of fat content in the case of mixed milk of cow and buffalo, it is not possible to hold that the article . . . was adulterated" and held that the mixture was not proved to be below the prescribed standard. We respectfully disagree with this observation of our learned brothers; it is possible in the circumstances mentioned above to find that a mixture of the two kinds of milk is below the prescribed standard. Jaswant Rao ought to have been convicted and the decision in the case does not lay down the correct law.

We were referred to another case *Municipal Board, Kanpur,* v. *Badloo* (1) decided by our brother DWIVEDI, J. There also the proportion in which the two kinds of milk were mixed was not known; the Public Analyst found that the mixture contained 4.8 per cent. of milk fats and 7.4 per cent. of non-fatty solids and 15 per cent. of added water. The quantity of non-fatty solids was less than the minimum prescribed for cow milk and, therefore, the mixture was undoubtedly adulterated. Our learned brother, however, acquitted the accused.

(1) 1960 A.L.J. 318.

He also over-emphasized the fact that the rules do not prescribe any standard for mixture. With great respect we point out that no question of standard for a mixture arises when the quantity of milk fats or of non-fatty solids is less than the prescribed minimum for cow milk. In that case the public analyst, not knowing the proportion in which the two kinds of milk were mixed, assumed that they were mixed half and half and took the mean of the two prescribed minima for the two kinds of solids and applied the means to find whether the prescribed standard was maintained or not; he was certainly in error in doing so. In what proportion the two milks were mixed was not a matter of assumption at all. Only one presumption is permissible under the rules and it is that contained in rule A. 11.01.03 and is to the effect that where milk is sold or offered for sale without any indication as to whether it was derived from cow, buffalo, goat or sheep, the standard prescribed for buffalo milk shall apply. This presumption cannot apply when it is known that the milk sold or offered for sale is a mixture of cow milk and buffalo milk, even if the proportion in which the two kinds of milk are mixed is not known. The presumption applies only when the source is unknown. It is doubtful if it is intended to apply when milk is derived from two or more sources and in any case absence of indication as to the proportion in which milk derived from one source is mixed with milk derived from another source does not mean absence of indication as to whether it is derived from one source or another. In *Chandrika Prasad* v. *State*, (1) a mixture of cow milk and buffalo milk sold by Chandrika Prasad was found to contain 2.6 per cent of milk fats and our learned brother holding that the mixture without being adulterated as such could not possibly contain less milk fats than the minimum prescribed for cow milk, convicted him of adulteration. His decision supports the

(1) Criminal Revision no. 313 of 1960, decided on 13th November, 1960.

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view that we take. Our brother MATHUR J. in his referring order in the connected Revision no. 1581 of 1960 stated that if a mixture of the two kinds of milk contains less than 3 5 per cent of milk fats or less than 8.5 of non-fatty solids, it is of purity or quality below the prescribed minimum We respectfully agree with this view.

Since in the instant case the percentage of non-fatty solids was less than the prescribed minimum for cow milk, the mixture of cow milk and buffalo milk was adulterated within the meaning of section 2(i) (1), and the applicant was guilty under section 16.

Since he was convicted for an offence which was a second offence in the sense that it was committed after another offence had been previously committed, he could be punished under section 16(1) (ii). Section 16 (i) (ii) lays down that for a second offence the accused must be punished with imprisonment for a term not less than one year and a fine not less than two thousand rupees, in the absence of special and adequate reasons to the contrary. Here the Magistrate sentenced the applicant to six months' imprisonment and one thousand rupees fine: he did not impose the minimum punishment because he found some special and adequate reasons to the contrary. The sentence that he imposed is less than the sentence that could have been imposed under section 16(1) (i) for the first offence. When he did not want to impose a punishment higher than what he could for the first offence, it is not understood why he resorted to section 16(1) (ii) at all. An offence punishable under section 16(1) (ii) must be tried as a warrant case because punishment extending up to two years can be imposed, but the applicant was tried according to the summons case procedure, which was illegal. We are, however, satisfied that no prejudice was caused to him by the Magistrate's adopting summons case procedure instead of warrant case procedure. Sri *P. N. Misra*

could not state what prejudice was caused to him by adoption of the wrong procedure, and the irregularity is curable under section 537 of the Code of Criminal Procedure. Even otherwise, we could alter his conviction from that under section 16(1) (ii) to that under section 16(1) (i) and treat him as a first offender and maintain the sentence, which is less than the maximum prescribed for first offence.

In the connected case no. 1708 of 1960 the proportion in which cow milk and buffalo milk were mixed is not known, but the quantity of non-fatty solids was less than the minimum prescribed for cow milk and the applicant was rightly convicted He was sentenced to six months' imprisonment, the trial court taking into consideration the aggravating fact that he had been convicted under the U. P. Pure Food Act on 5th February 1955 for selling adulterated milk. Though it could not sentence him under section 16(1) (ii) and did not profess to sentence him under that provision (because the first offence was not under this Act but under another Act), it had to take his antecedents into consideration when imposing the punishment and his conviction for selling adulterated milk was a fact which could legitimately be taken into consideration. It has already taken into consideration his old age and refrained from making the punishment rigorous and there is no scope for any reduction in the sentence.

In the connected case no. 1581 of 1960 the proportion of cow milk and buffalo milk was known from before, it being 1 : 2. The applicant himself professed to sell a mixture of one part of cow milk and two parts of buffalo milk. The percentage of milk fats in the sample was 1.0 which was far below the minimum prescribed even for cow milk. The percentage of non-fatty solids also was less than the minimum prescribed for cow milk.

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There is no doubt whatsoever that the mixture was grossly adulterated and the applicant was rightly convicted. Whether he had offered the milk for sale or not was a matter of fact. The evidence of the Inspector is to the effect that he had exposed it for sale and this evidence was not challenged in cross-examination. As against it there was only the applicant's statement that he had not exposed the milk for sale and that it was meant only for use in tea. It was for the courts of fact to decide whether he had exposed the milk for sale or whether he had kept it for private consumption. Their finding that he had exposed it for sale is not at all improper. This case was referred to a Bench by our brother D. S. MATHUR, who said in the referring order that it was not clear whether the milk sold by the applicant was buffalo milk or cow milk or a mixture of the two kinds of milk and that if the nature of milk was not known, it could be presumed to be buffalo milk. Actually there was evidence that the applicant professed to sell cow milk and buffalo milk mixed in proportion of 1:2. There is, therefore, no question of resorting to the presumption contained in rule A. 11.01 03.

Coming to Criminal Revision no. 1950, the proportion in which cow milk and buffalo milk were mixed was known, it being 1:4. Since the proportion was known there was no difficulty in applying the prescribed standards and the milk was undoubtedly adulterated according to them. The question put to the applicant by the Magistrate was certainly meaningless, but no prejudice has been caused to him. He pleaded not guilty and said that he was not the owner of the milk, and that he had sold it in a sealed drum on behalf of the co-operative union. Under section 16 read with section 7, not only the master but also the servant who actually does the act of selling or distribution is liable. Even if it be said that the applicant not being the owner of the milk

did not sell it, he undoubtedly distributed it. Ownership is not required for distribution. He could not rely upon the defence mentioned in section 19 (2), because he did not fulfil all the three conditions required for it. There are also provisos which shut out the defence in this case. Finally, the defence is not open to a servant. If it were open to a servant he would always escape punishment and it was not the intention behind section 16 read with section 7 that only the master should be punished. The sentence imposed upon the applicant is six months; we do not consider it so heavy that we must interfere with it in revision.

In the last revision no. 1927 the proportion in which the two kinds of milk was mixed was not proved, but the percentage of non-fatty solids was less than the minimum prescribed even for cow milk and, therefore, the milk was adulterated. The applicant is the master and owner of the milk and he has been sentenced to imprisonment of six months and two hundred rupees fine. We do not consider this sentence as excessive at all, even though the non-fatty solids, and not the milk fats, were less than the prescribed minimum.

In the result, we dismiss this application. The applicant is ordered to surrender himself to undergo the sentence.

Application dismissed.

(FULL BENCH) CIVIL MISCELLANEOUS

Before the Honourable M. C. Desai, Chief Justice Mr. Justice J. Sahai and Mr. Justice B. Dayal.

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May, 17

KALYAN SINGH (PETITIONER)

v.

STATE OF UTTAR PRADESH AND OTHERS (RESPONDENTS)

Appeal to Supreme Court *from an order dismissing petition for certiorari and mandamus—Certificate for leave to appeal granted by the High Court—Power of High Court to grant interim relief to petitioner-appellant—Constitution of India, 1950, Art. 133(1)(c)—Code of Civil Procedure, 1908, O. XLV, r. 13 and s. 151.*

Consequent to the nationalisation of transport service and the cancellation of his licence on a particular route, the petitioner moved the High Court for certiorari quashing the relevant notifications of the Government and for *mandamus* restraining the State authorities from interfering with his right to ply on the said route. The petition being dismissed, the petitioner prayed for, and was granted, leave to appeal to Supreme Court under Art. 133(1) (c) of the Constitution. In a petition to the High Court for an interim relief restraining the State authorities from interfering with his right to ply on the route:

Held, (*per* majority, B. DAYAL, J *contra*) that the High Court had no power to grant interim relief in such cases either under O. XLV, r. 13 or s. 151 of the Code of Civil Procedure.

The only provision in O. XLV, r. 13 which could be invoked in such a case was sub-rule (2) (*d*) but the first part of this sub-rule does not obviously apply because the respondent is not seeking the assistance of the Court and cannot, therefore, be placed under any condition. The second part of the sub-rule is equally inapplicable since the subject-matter of the appeal is the refusal of the High Court to issue the writ or the right claimed or wrong complained of which is not amenable to any interim direction.

Since the subject is exhaustively dealt with and excluded from the provisions made under O. XLV, r. 13, s. 151 cannot be invoked in this case.

Girja Prasad Sunder Lal v *Divisional Forest Officer, Dudhi* (1) over-ruled.

(1) A.I.R. 1955 All. 589.

View of DESAI, J. in *State of U. P. v. Mukhtar Singh* (1) affirmed

Lala Atma Ram v Beni Prasad (2) applied

(*Per* B. DAYAL, J.)—The subject-matter of the appeal in this case is the petitioner's right to ply the bus and is covered by the second part of sub-rule (2) (*d*) of O XLV, r. 13 and the High Court has, therefore, the power to issue the interim direction.

Since the power is specifically provided for under the aforesaid sub-rule, there is no need or scope for the availability of s. 151 of the Code.

Civil Misc. Application no. 1258 of 1961 in Supreme Court Appeal No. 26 of 1961 (arising out of Civil Misc. Writ No. 3116 of 1960).

(The case was at first heard by Hon BEG and SRIVASTAVA, JJ., who, in view of conflict of decisions referred it to a Full Bench).

The facts appear in the judgment.

S. N. Kacker for the applicant

Junior Standing Counsel (*K. B. Asthana*) for the State

J. SAHAI, J.:—This Full Bench has been constituted to answer the following question referred by a Bench consisting of our brothers BEG and SRIVASTAVA:

> "When a writ petition under Article 226 of the Constitution has been decided and the necessary certificate for filing an appeal to the Supreme Court as required under the Constitution has been granted has this Court jurisdiction to grant interim relief to the party seeking to appeal to the Supreme Court under Order XLV, rule 13 of the Civil Procedure Code or under section 151 of that Code or under any other provision of law."

The question has arisen in the following circumstances:

Kalyan Singh (hereinafter called the petitioner) had a permit to ply his stage carriage on the Kanpur-Bela-Bidhuna via Chaubepur route (hereinafter referred to

(1) A.I.R. 1957 All 305 (2) A.I.R. 1934 All 585.

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as the route) A notification under section 68-C of the Motor Vehicles Act published in the *Uttar Pradesh Gazette*, dated 28th May 1960 was issued nationalizing the route. Another notification dated 12th November 1960 was also published in the *Uttar Pradesh Gazette* providing for cancellation of the petitioner's permit 15 days thereafter i.e., with effect from 27th November 1960. The petitioner filed a writ petition in this Court challenging the two notifications mentioned above and prayed for a writ of *certiorari* quashing those notifications as also for a writ of *mandamus* commanding the respondents the State of Uttar Pradesh, the Regional Transport Authority, Kanpur, and the Secretary, Regional Transport Authority, Kanpur, not to interfere with his right to ply on the route. That petition was heard by a Division Bench consisting of our brothers GURTU and SRIVASTAVA who dismissed the same. Thereafter an application was made under Article 133 (1) (*c*) of the Constitution of India praying that the case be certified to be a fit one for appeal to the Supreme Court of India That certificate has been granted by our brothers BEG and SRIVASTAVA. Along with the application under Article 133 (1) (*c*) of the Constitution was made another application purporting to be under Order XLV, Rule 13, Civil Procedure Code with the following prayer:

> "Wherefore it is respectfully prayed that suitable interim directions may issue to the respondents directing them not to interfere in any manner whatsoever with the appellant's right to ply his stage carriage on Kanpur-Bela-Bidhuna via Chaubepur route during the pendency of this Supreme Court Appeal."

The application was opposed on behalf of the respondents mainly on the ground that this Court had no jurisdiction to entertain the application. Our brothers

BEG and SRIVASTAVA referred the case to a Full Bench in view of a conflict between two reported decisions of this Court i.e., *Girja Prasad Sunder Lal* v. *Divisional Forest Officer, Dudhi* (1) and *State of Uttar Pradesh* v. *Mukhtar Singh* (2). Before our brothers BEG and SRIVASTAVA it was contended on behalf of the petitioner that the application was maintainable under Order XLV Rule 13 and section 151, Civil Procedure Code, as also under Article 226 of the Constitution of India. In view of the decision of the Supreme Court in the case of *State of Orissa* v. *Madan Gopal Rungta* (3) the submission that the application for interim orders could be entertained under Article 226 of the Constitution was withdrawn. We are now called upon to decide whether the application for interim orders made by the petitioner is maintainable under Order XLV, Rule 13 or section 151, Civil Procedure Code. Rule 26 of Chapter XXIII of the Rules of this Court makes the provisions of Order XLV, Civil Procedure Code applicable to those cases also which are not governed by the Civil Procedure Code. The said rule reads as follows:

> "*Rule* 26. In cases not governed by the Code the provisions of Order XLV of the Code shall, so far as may be and with such adaptations and modifications as may be found necessary, apply."

In view of that rule we have to proceed on the footing that Order XLV, Rule 13 is applicable to final orders passed in a writ petition. The said provision reads as follows:

> "*Rule* 13. (1) Notwithstanding the grant of a certificate for the admission of any appeal, the decree appealed from shall be unconditionally executed, unless the Court otherwise directs.

(1) A.I.R. 1955 All. 589. (2) A.I.R. 1957 All. 503.
(3) A.I.R. 1952 S.C. 12.

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(2) The Court may, if it thinks fit, on special cause shown by any party interested in the suit, or otherwise appearing to the Court, —

(a) impound any movable property in dispute or any part thereof, or

(b) allow the decree appealed from to be executed, taking such security from the respondent as the Court thinks fit for the due performance of any order which the Supreme Court may make on the appeal, or

(c) stay the execution of the decree appealed from, taking such security from the appellant as the Court thinks fit for the due performance of the decree appealed from, or of any decree or order which the Supreme Court may make on the appeal, or

(d) place any party seeking the assistance of the Court under such conditions or give such other direction respecting the subject-matter of the appeal as it thinks fit, by the appointment of a receiver or otherwise."

This rule is divided into two sub-rules. Sub-rule (1) provides and declares that unless the Court otherwise directs the decree-holder shall have a right to execute his decree unconditionally notwithstanding the grant of a certificate. Sub-rule (2) deals with the powers of the Court in connection with the decree sought to be appealed from in the Supreme Court of India. Under this sub-rule a High Court can either on its own motion or on an application by an interested party in the suit impound any movable property in dispute or allow the conditional execution of a decree or stay the execution thereof subject to security being furnished or place the party seeking assistance of the Court under such conditions as it thinks fit respecting the subject-matter

of appeal or pass any other order respecting the subject-matter of appeal as it thinks fit, as for example an order appointing a receiver. Order XLV, Rule 13 speaks only of decrees but sub-rule (1) of that Order provides that unless there is something repugnant in the subject or context the expression decree shall include a final order. Though one of us (DESAI, J. as he then was) in the case of State of *Uttar Pradesh* v. *Mukhtar Singh* (1) held that even by virtue of the provisions of Order XLV, Rule 1, Civil Procedure Code a final order passed in a writ petition could not amount to a decree within the meaning of Order XLV, Rule 13, Civil Procedure Code, it is not necessary to go into that question because *Mr. K. B. Asthana*, learned Junior Standing Counsel has conceded that the final order passed in the petitioner's writ application would amount to a decree within the meaning of Order XLV, rule 13, Civil Procedure Code. In view of this concession I now proceed to consider whether or not Order XLV, Rule 13 can be applied to the facts of the present case.

It is true that the question referred to us is in abstract and a general one and not confined to the application made by the petitioner for interim orders in this case, but it is obvious that the answer has not to be given in abstract and in a general way but has got to be in the light of the facts of the case before us, and it appears to me that that was precisely what our brothers BEG and SRIVASTAVA wanted the Full Bench to answer. Once a certificate has been granted under Art. 133 (1) (c) of the Constitution of India this Court has already taken for granted that the order passed in the writ petition of the petitioner was an order passed in a civil proceeding. Rule 26 of Chapter XXIII of the Rules of the Court expressly makes the provisions of Order XLV, Rule 13, Civil Procedure Code, applicable even to

(1) A.I.R. 1957 All. 505.

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those civil proceedings which are not governed by the Code of Civil Procedure. It was conceded by Mr. *K. B. Asthana* the learned Junior Standing Counsel both before us as also before our brothers BEG and SRIVASTAVA that the order passed in the petitioner's writ petition was a decree within the meaning of Order XLV, Rule 13, Civil Procedure Code by virtue of the provisions of Rule 1 of that Order. Consequently, there would be no difficulty in answering the question in abstract by saying that whether or not Order XLV, Rule 13 or section 151, Civil Procedure Code would apply to a case where a final order in a writ petition has been passed and a certificate that the case is a fit one for appeal to the Supreme Court granted, would depend upon the nature of the final order passed and the interim relief prayed for. It appears to me that what our brothers BEG and SRIVASTAVA wanted us to answer was whether the particular application which the petitioner has made in this case for interim orders could be entertained either under Order XLV, Rule 13 or section 151, Civil Procedure Code. In other, words, the question is whether the prayer that the petitioner has made is covered by any of the clauses of Order XLV, Rule 13 or can be granted under section 151, Civil Procedure Code.

Learned counsel for the petitioner is relying upon clause (*d*) of sub rule (*2*). He is not invoking the provisions of clauses (*a*) to (*c*) of that sub-rule which obviously cannot apply to this case. It is, therefore, necessary to consider the precise scope of clause (*d*). To my mind by means of that provision the Court has been given the power to put to terms any party who has sought its assistance i e., who has applied to it for any orders in respect of the subject-matter of the appeal. It also gives the power to the Court to issue any other direction in respect of the subject-matter of the appeal

e.g., an order appointing a receiver of the property in dispute, or even to issue an injunction. It is however clear that it is only the party which is seeking the assistance of the Court which can be placed under conditions and not the other party. A Division Bench of this Court in the case of *Lala Atma Ram* v. *Beni Prasad* (1) while dealing with the scope of this clause observed as follows:

> "It is further clear that sub-rule 2(*d*) also cannot apply because that deals with the power of the Court in placing any party seeking the assistance of the Court or giving other directions respecting the subject-matter of the appeal. That sub-rule obviously refers to cases where a party is to be put to certain terms or where some order has to be made regarding the custody or disposal of the subject-matter of the appeal."

I find myself in respectful agreement with this view. The petitioner's case cannot obviously fall in the first part of clause (*d*). In effect what the petitioner has prayed for is that, notwithstanding the dismissal of his petition, he may be allowed to ply his stage carriage on the route and the respondents be restrained from in any manner interfering with the petitioner's doing so as if the petition had been allowed. Under the first part of clause (*d*) the petitioner who was the party seeking the assistance of the Court could be put to such conditions as the Court thought fit and the plain meaning of the words used in that part of clause (*d*) warrants the conclusion that the respondents in this case who are not the party seeking the assistance of the Court cannot be put under any conditions. The language is so clear that no authority is needed in support of this conclusion. However if one was necessary the

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(1) A.I.R. 1934 All. 585.

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decision of the Madras High Court in the case of *Rajahmundry E. S. Corporation* v. *State of Madras* (1) can easily be pointed out. It has now to be considered whether the petitioner's application can be entertained under the second part of clause (*d*).

While interpreting clause (*d*) or any other clause of sub-rule (2) of Order XLV, Rule 13 it must not be forgotten that the powers are given only for the purposes of interim protection of the subject-matter of the appeal. The Court has no jurisdiction to in effect modify, alter, reverse or supersede even temporarily the decree or the final order already passed. If that cannot be done directly it can also not be done indirectly by means of a direction under Order XLV, Rule 13 (2) (*d*), Civil Procedure Code for what is prohibited being done directly cannot be done indirectly [*See Madden* v. *Nelson and Fort Sheppard Railway*, (2) and *The Attorney General of Saskatchewan* v. *The Attorney General of Canada* (3)]. It would be subversive to the scheme of the Code of Civil Procedure to hold that under the second part of clause (*d*) a direction can be issued which may have the effect of temporarily setting aside the final order passed by this Court in the petitioner's writ petition and replacing it by another. A decree or final order cannot be altered, modified, set aside or superseded by a mere direction; it can only be so done by another decree or final order. There is nothing in Order XLV, Rule 13 or any other provision of the Civil Procedure Code which can lend support to the view that a direction can be given under clause (*d*) which may have the effect of superseding a decree even though temporarily. The scheme of the Code is that even though a certificate has been granted the decree or the final order remains alive and with full

(1) A.I.R. 1953 Mad. 475. (2) L.R. (1899) A.C. 626.
(3) A.I.R. 1949 P.C. 190.

force. Any order that can be passed under any of the clauses of sub-rule (2) of Order XLV, Rule 13 must be confined within the restrictions of not in any manner changing even temporarily the decree or the final order passed. Whereas orders can be passed respecting the subject-matter of the appeal and the operation of a decree may be stayed the nature of the order must be only to give interim protection it cannot be an order completely different from and diametrically opposed to the decree or final order and one which may have the effect of bringing about a completely different result than the one provided for by the decree or the final order In other words no direction can be given which may make the defeated party the winning one and the winning one the losing party. It must also be remembered that the general rule is that after a final order or decree is passed the Court passing it becomes *functus officio* and that thence forward, until set aside in appeal, the decree or final order remains unchangeable and cannot be interfered with by the Court that passed it except under circumstances expressly provided for in the Code e.g., by means of a review under Order XLVII, Civil Procedure Code. The provisions of sub-rule (2) of Order XLV, Rule 13 must be interpreted in the background of this basic rule. Sub-rule (1) of Order XLV, Rule 13 clearly provides that notwithstanding the grant of a certificate the decree-holder shall be entitled to execute his decree unconditionally unless the Court otherwise directs. The powers under sub-rule (2) of that rule must, therefore, be read subject to these basic principles and it is not permissible in the name of a direction under clause (*d*) to make an encroachment on the decree or final order itself

Learned counsel for the petitioner has placed reliance upon the case of *Girja Prasad Sunder Lal* v. *Divisional Forest Officer, Dudhi* (1). In that case firm Girja

(1) A.I.R. 1955 All. 589

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Prasad Sunder Lal had obtained on 8th April 1953 a *theka* for 7 years from the Raja of Singrauli for collection of *tendu* leaves for manufacture of *biris* from a forest in Mirzapur District. The provisions of the U. P. Zamindari Abolition and Land Reforms Act, 1951, were extended to the area within which the forest of which Girja Prasad Sunder Lal had taken the *theka* for collecting *tendu* leaves was situated. The forest Department, notwithstanding the *theka* in favour of Girja Prasad Sunder Lal, auctioned the right to collect *tendu* leaves in that forest. One Behari Lal made a bid of Rs.2,000 which was the highest at the auction and the Forest Department, therefore, authorized him to collect the *tendu* leaves whereupon Girja Prasad Sunder Lal filed a writ petition in this Court against the Divisional Forest Officer and the State of Uttar Pradesh for a writ or direction to restrain them from interfering with his right to collect *tendu* leaves. An interim order to that effect was issued the same day. The petition was dismissed later on and an application was made under Article 133 (1) (c) of the Constitution of India praying for a certificate that the case was a fit one for appeal to the Supreme Court, and a certificate was granted. The question that arose in that case was whether this Court could under Order XLV, Rule 13, Civil Procedure Code pass the same interim order which it had passed at the time when the writ petition was admitted. Our brothers CHOWDHRY and UPADHYA held that such an order could be passed under clause (*d*) of sub-rule (2) of Order XLV, Rule 13, and observed as follows:

> "So far as the applicability of the clause is concerned, the case does seem to belong to the second category since the petitioner prays for an injunction to restrain the respondents from interfering with its rights of collecting *tendu* leaves which is

the same thing as seeking a direction respecting the subject-matter of the appeal.

This inference is confirmed by the fact that the particular portion of clause (*d*) mentions appointment of a receiver as one of the directions which a Court may give respecting the subject-matter of the appeal.

Any order or direction that may be necessary for the preservation of the subject-matter of the litigation may therefore be passed or given under the second part of clause (*d*).

Preservation of course means keeping the subject-matter of the litigation safe from harm to the rights of either and not only one of the parties of the litigation, for at the time that the order of direction of court is prayed for it is not possible to foresee which party would eventually succeed.

One way of doing it can be to allow a party which has been in enjoyment of the right in question under a semblance of title, even though disputed title, to continue to exercise that right pending final determination of the rights of the parties but at the same time to take such security from that party as would compensate the opposite party in the event of the latter eventually succeeding."

With the greatest respect to our learned brothers I am unable to agree with them. The result of the injunction order that our brothers passed was that though Girja Prasad Sunder Lal had lost the case and their writ petition had been dismissed, they became the winning party and enjoyed rights under the interim order granted under Order XLV, Rule 13, Civil Procedure Code which this Court had held while dismissing the writ petition that they were not entitled to, and the Divisional Forest Officer, who was the winning

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party was relegated to the position of the losing party. It appears to me that such an order would be completely outside the ambit of Order XLV, Rule 13, Civil Procedure Code. Powers under clause (*d*) extend only to issue such directions which may preserve the subject-matter of dispute. In the name of preservation of property possession of the subject-matter of dispute cannot be handed over to the party with regard to whom the Court has finally held that he has no right to receive it.

The next case on which reliance was placed by the learned counsel for the petitioner is that of *Ramanathan* v. *Viswanathan* (1). In that case a final decree had been passed by the subordinate court during the pendency of an appeal to the Privy Council from a preliminary decree in a mortgage suit and the High Court allowed an application of the appellant under Order XLV, Rule 13(2) (*d*) and stayed execution of the final decree. The same Court in the case of *Rajahmundry E. S. Corporation* v. *State of Madras* (2) considered this decision and RAJAMANNAR, C.J., while dealing with it observed as follows:

> "The decision may be supported on the ground that in effect the Court was staying the execution of the decree appealed from, because an appeal against a preliminary decree is in a sense an appeal against the final decree in so far as the final decree is dependent on the preliminary decree. Moreover, the learned Judges in that case do not appear to have considered the scope of clause (*d*), namely, whether it enables the Court to place the party other than the party seeking the assistance of the Court under any conditions or to give any directions to such a party preventing him from enjoying the fruits of the order against which the appeal is pending."

(1) A. I. R. 1939 Mad. 50. (2) A. I. R. 1953 Mad. 475.

Thus the Madras High Court itself in a subsequent decision doubted its correctness In the first place *Ramanathan's case* (1) is distinguishable and not applicable to the facts of our case. In the second place to my mind the language of sub-rule (2) of Order XLV, Rule 13 does not warrant the conclusions recorded by the learned Judges in that case. Under that rule a High Court cannot stay proceedings pending in a subordinate court and can issue directions only in respect of proceedings which have been terminated in the High Court and in respect of which appeal is proposed to the Supreme Court.

The decision of the Calcutta High Court in the case of *Lalitessur Singh* v. *Bhabessur Singh* (2) and that of this Court in the case of *Ram Narain* v. *Harnam Das* (3), which was approved of and followed by another Division Bench of our Court in the case of *Lala Atma Ram* v. *Beni Prasad* (4), are in direct conflict with the view taken by the Madras High Court in *Ramanathan's case* (1). With great respect I am unable to agree with the decision of the Madras High Court in the above case.

Mr. *Kakkar* next placed reliance upon the case of *Sarat Kumar Roy* v. *Official Assignee of Calcutta* (5). In that case the High Court of Calcutta set aside an *ex parte* preliminary decree in a mortage suit and directed that the suit be reheard. An application for leave to appeal to the Privy Council was filed against the decision of the Calcutta High Court and a petition was also made under Order XLV, Rule 13, Civil Procedure Code praying that the rehearing of the suit be stayed. The Calcutta High Court in the case mentioned above stayed the rehearing of the suit purporting to act under Order XLV, Rule 13 and section 151, Civil Procedure

(1) A.I.R. 1939 Mad. 50.
(2) (1909) 13 C.W.N. 650
(3) A.I.R. 1919 All. 14.
(4) A.I.R. 1934 All. 585.
(5) A.I.R. 1931 Cal. 79.

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Code. The facts of this case are very different from the facts before us. The stay of the rehearing of proceedings would not have the effect of superseding the decree of the High Court and temporarily substituting it by another order inconsistent with that decree. Apart from it it may be stated that the learned Judges who decided this case did not consider the Full Bench decision of their own Court in *Lalitessur Singh's case* (1), where a completely different view was taken. I am unable to agree with this decision also for the same reasons for which I have disagreed with the decision reported in *Ramanathan's case* (2).

Three other cases of the Calcutta High Court were brought to our notice by *Mr. S. N. Kakkar*. They are *Nanda Kishore Singh* v. *Ram Golam Sahu* (3) *Sailendra Nath Das* v *Saroj Kumar Das* (4) and *Ramendra Narayan Roy* v. *Smt. Bibhabati Debi* (5).

In the first case the execution of a decree in respect of which an appeal was proposed to be filed in the Privy Council, was stayed even before leave had been granted. The Bench who stayed it consisted of MOOKERJEE and HOLMWOOD, JJ. HOLMWOOD, J. did not agree with MOOKERJEE, J., but because of clause 36 of the Letters Patent the opinion of MOOKERJEE, J., became the rule of the Court.

In the second case the Calcutta High Court purporting to act under Order XLV, Rule 13 and section 151, Civil Procedure Code stayed further proceedings in the suit pending decision of the application for leave to appeal to the Privy Council.

In the last case large sums of money were held in deposit in the High Court. An application was made for leave to appeal to the Privy Council. Before that application could be decided it was prayed that the sums of

(1) (1909) 13 C.W.N. 690.
(2) A.I.R. 1939 Mad. 50.
(3) (1912) I.L.R. 40 Cal. 955.
(4) A.I.R. 1934 Cal. 823.
(5) A.I.R. 1942 Cal. 488.

money held in deposit be not paid to the decree-holder. The Calcutta High Court directed that the payment be not made till a particular date.

None of these three cases touch the point that requires determination by us. The effect of the orders passed was not in any way to go behind the decrees passed in these cases.

The learned counsel then placed reliance upon the case of *Rani Shankeramma* v. *Ramchandra Reddy* (1). In that case Rani Shankeramma, who was the daughter of the last male holder of a large estate, obtained a grant of succession by the revenue authorities to the estate. Ramchandra Reddy, who had been adopted by the widow of the last male holder, succeeded in getting the grant of succession in favour of Rani Shankeramma reversed whereupon Rani Shankeramma filed a writ petition in the Hyderabad High Court praying for the issue of writs of *certiorari*, prohibition and *mandamus* with a view not only to set aside the judgment against her, but also to have the estate released as it had been under the supervision of the Court of Wards ever since the death of her father. That writ petition was allowed by a Division Bench of the Hyderabad High Court whereupon Ramchandra Reddy made an application for leave to appeal to the Supreme Court and also prayed for the stay of the order passed by the High Court on the writ petition of Rani Shankeramma. The Hyderabad High Court stayed that order. This case again is a clearly distinguishable one and does not touch the point that is in controversy before us.

The last case on which reliance was placed on behalf of the petitioners is that of *In re B, an Advocate of Banaras* (2),. In that case a legal practitioner had been suspended for a period of three months. He made an

(1) A.I.R. 1953 Hyd. 73 (2) A.I.R. 1933 All. 259.

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application for leave to appeal to the Privy Council and this Court suspended the operation of the order passed by it suspending the legal practitioner.

It would be noticed that the facts of none of the cases relied upon by the learned counsel for the petitioner except *Girja Prasad Sunder Lal* v. *Divisional Forest Officer, Dudhi,* (1) are similar to the facts of the case before us. In each one of those cases there was an executable decree or order the excution of which was stayed or there was a suit pending which the High Court thought fit to say. The consequence of none of the orders passed in those cases was to supersede the decree already passed and to replace it by another order diametrically opposed to the decree for the period of the pendency of the appeal in the Privy Council or the Supreme Court. The view that I am taking is not inconsistent with the decisions of this Court in *Ram Navain* v. *Harnam Das* (2) and in *Lala Atma Ram* v. *Beni Prasad* (3) and that of the Calcutta High Court in *Lalitessur Singh* v. *Bhabessur Singh* (4) already adverted to in an earlier part of this judgment. In circumstances similar to ours the Assam High Court in *Jitendra Narain Deb* v. *State of Assam* (5), the Rajasthan High Court in *Sajjan Singh* v. *State of Rajasthan* (6) and the Madras High Court in *Rajahmundry E. S. Corporation* v. *The State of Madras* (7) rejected the application made by the defeated parties for orders similar to one which is sought from us. I am in respectful agreement with the views of the learned Judges mentioned above. Our own Court in the case of *State of Uttar Pradesh* v. *Mukhtar Singh* (8) had dealt with a similar matter. In that case what had happened was that a writ petition had been filed for issue of a writ of *certiorari* for quashing

(1) A.I.R. 1955 All. 589.
(2) A.I.R. 1934 All. 585.
(3) A.I.R. 1953 Ass. 159.
(4) A.I.R. 1953 Mad. 475.
(5) A.I.R. 1919 All. 14.
(6) 13 C. W. N. 690.
(7) A.I.R. 1954 Raj. 501.
(8) A.I.R. 1957 All. 505.

certain orders passed by the Consolidation of Holdings authorities on the ground that several provisions of Consolidation of Holings Act were unconstitutional. A Bench of this Court held that only section 14 of the Act was *ultra vires* the U. P. Legislature and quashed certain orders. The State of U. P., which was the respondent in that case, filed an application for certificate for leave to appeal to the Supreme Court under Article 133 (1) (*c*) of the Constitution and also made an application praying that the operation of the order passed by this Court in the writ petition be stayed. DESAI, J. (as he then was) held that the application could not lie under Order XLV Rule 13 Civil Procedure Code and also that there were no merits in the application. The other learned Judge (BEG, J.) refrained from expressing any opinion on the legal question with regard to the applicability of Order XLV, Rule 13, Civil Procedure Code, but agreed that on merits the application for interim orders should be dismissed. I find myself in respectful agreement with the view of DESAI, J. (as he then was) that an application of that nature could not be entertained under the provisions of Order XLV, Rule 13, Civil Procedure Code.

In this case the Court has dismissed the writ application of the petitioner with costs with the result that the petitioner's prayer for the issue of a writ of *mandamus* commanding the respondents not to interfere with his right to ply his stage carriage on the route as also his prayer for a writ of *certiorari* quashing the impugned notifications were rejected. There is, thus, no order which is capable of being executed, nor is there any thing that can be stayed. There is also nothing in respect of which the Court can issue any directions.

Lastly directions under clause (*d*) can be issued respecting the subject-matter of appeal. The question that immediately arises, therefore, is what is the subject-matter of appeal in the present case. If it were a

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claim with regard to a house or a piece of land or sums of money, the subject-matter of appeal would have been the house or the piece of land or the sums of money. In the present case the subject-matter of appeal can only be the right which the petitioner was claiming as against the respondents and in respect of which he prayed for a judgment of this Court. Some times the word "subject-matter" has been treated to be as equivalent to a cause of action, see *Shadi Ram* v. *Amin Chand* (1). In the present case the cause of action is the right claimed, or the wrong alleged to have been suffered, by the petitioner on the one hand and the alleged duty of the respondents on the other. It is obvious that no directions can be issued in respect of such a subject-matter under clause (*d*) of Order XLV, Rule 13, Civil Procedure Code as the matter by its nature is incapable of being amenable to any directions. For these reasons I am of the opinion that Order XLV, Rule 13, Civil Procedure Code cannot apply to the facts of the case before us.

The other question which requires determination is whether the order prayed for by the petitioner can be granted under the provisions of section 151, Civil Procedure Code. That section merely preserves the inherent powers of the Court which it may possess and does not grant any new powers. There is good authority for the proposition that it does not apply where there is an express provision in the Code dealing with the particular matter. Order XLV, Rule 13 has been enacted to give relief after a certificate has been granted. The powers that the Court has got in such matters is exhaustively dealt with in that provision and if there is any thing which has been withheld and is not provided for in that provision, section 151 cannot be used to provide for it, see *Mukund Lal* v. *Gaya Prasad* (2).

(1) A.I.R. 1939 Lah. 987. (2) A.I.R. 1935 All. 599 (F. B.).

It has been strenuously contended that it is of utmost importance that the subject-matter of appeal should be preserved during the litigation so that the party who ultimately succeeds in the Supreme Court, may not stand to lose only because this Court has not passed orders preserving the subject-matter of appeal. Reliance has been placed upon a decision of the House of Lords in *Polini v. Gray* (1) and the following passages from that judgment has been read out to us:

" . . . An action is brought to determine the rights of claimants to a fund. The plaintiffs fail in the Court of first instance and in the Court of second instance, but are about, '*bona fide*', to prosecute an appeal to the Court of ultimate resort. The plaintiffs allege that that appeal will be nugatory if the fund is paid out to the defendants, and that if the plaintiffs should ultimately succeed in the House of Lords, that success will be useless to them unless an interim order is made for preserving the fund. I say they so contend, and, assuming the contention to be correct in fact, the question is whether this Court has jurisdiction to prevent such a consequence. It appears to me on principle that the Court ought to possess that jurisdiction, because the principle which underlines all orders for the preserving of property pending litigation is this, that the successful party in the litigation that is the ultimately successful party, is to reap the fruits of that litigation, and not obtain merely a barren success. . ."

" . . . The only question we have to consider is, whether or not the Court has jurisdiction in a proper case to stay all dealings with a fund pending an appeal to the House of Lords although the Court has decided against the title of the plaintiff

(1) L. R. [1879] 12 Ch. Division 438.

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and dismissed the action. I see no difference in principle between staying the distribution of a fund to which the Court has held the plaintiff not to be entitled, and staying the execution of an order by which the court has decided that a plaintiff is entitled to a fund. . . On what principle does it do so. It does so on this ground that when there is an appeal about to be prosecuted the litigation is to be considered as not at an end. and that being so, if there is reasonable ground of appeal, and if not making the order to stay the execution of the decree of the distribution of the fund would make the appeal nugatory, that is to say, would deprive the appellant, if successful, of the results of the appeal, then it is the duty of the Court to interfere and suspend the right of the party who so far as the litigation has gone, has established his rights. That applies, in my opinion, as much to the case where the action has been dismissed."

It is conceivable that the Court may have inherent powers to pass orders preserving the subject-matter of dispute or to suspend the right of the party who, so far as the litigation has gone, has established his right, during the pendency of the appeal to the higher Court, if there are no statutory provisions dealing with the question of the suspension of the order or the preservation of the subject-matter of the appeal during that period. There are, however, two serious obstacles in the way of the petitioner. In the first place I have already held that there is a statutory provision in the shape of Order XLV, Rule 13, Civil Procedure Code which exhaustively deals with the powers of the court relating to the preservation of the subject-matter of the appeal and the suspension of orders appealed against and as such there is no scope for any inherent

powers. Secondly the petitioner has not asked for the suspension of the order passed in his writ petition. Apart from it, as the final order of this Court stands, what is there to preserve and what benefit can the petitioner get if the order passed in his writ application is suspended? The only effect suspending that order would be that the decree for costs may not be executed. In no case the effect of suspending the order passed by this Court dismissing the petitioner's writ application with costs can be of granting him the injunction he has prayed for. Even the case of *Polini* v. *Gray* (1) does not contemplate an order similar to the one prayed for in this case by the petitioner but only speaks of the order under appeal being suspended. This case does not to my mind support the contention of the learned counsel for the petitioner that an injunction similar to the one prayed for by him can be granted by a Court exercising its inherent powers. It is clear that inherent powers cannot be invoked to nullify a decree and replace it by another thoroughly inconsistent with and diametrically opposed to it though only for the period of appeal in the Supreme Court. Besides, varieties of inherent powers of the Court are well recognised and new categories cannot be invented. The Civil Procedure Code makes ample provision for stay of execution of decrees in appropriate cases and it is not open to a court in the exercise of its supposed inherent powers to stay execution in cases other than those provided for merely on the ground that appeals are pending from them. Lastly, section 151 can only apply to cases where interference is required either in the interest of justice or to avoid an abuse of the process of the Court. It will be impossible for this Court to say that it would be against the interest of justice or would amount to an abuse of the process of the Court if it allows the order

(1) L.R. [1879] 12 Ch. D. 438.

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passed by itself in the writ petition to operate. It is obvious that this Court would not have passed the final order in the writ petition that it did pass if it had considered it either to be unjust or to have amounted to an abuse of the process of the Court.

For the reasons mentioned above I am of the opinion that so far as the present case is concerned the question referred to us should be answered in the negative and it should be held that the Court has no jurisdiction to grant interim relief to the petitioner, which he has prayed for either under Order XLV, Rule 13 or section 151, Civil Procedure Code. I am also of the opinion that the petitioner should pay the costs of the respondents in this case.

B. DAYAL, J.:—This Full Bench has been constituted to answer a question which has been referred to it in the following form:

> "When a writ petition under Article 226 of the Constitution has been decided and the necessary certificate for filing an appeal to the Supreme Court as required under the Constitution has been granted has this Court jurisdiction to grant interim relief to the party seeking to appeal to the Supreme Court under Order XLV, Rule 13 of the Civil Procedure Code or under section 151 of that Code or under any other provision of law?"

The last few words in the question "or under any other provision of law" appear to be redundant as only three provisions were referred to before the Bench and there was no argument that under any fourth provision also the order could be passed. Out of those three points, the Bench held that the powers of the Court under Order XLV, Rule 13, Civil Procedure Code and under section 151 of the Civil Procedure Code are such as require fresh consideration by a larger Bench. But

with regard to the third argument relating to the powers under Article 226 of the Constitution, the Bench was of the view that the matter was concluded by the Supreme Court in the case of *State of Orissa* v. *Madan Gopal Rungta* (1) and therefore, no relief could be granted under that article. In this view the Bench referred the above question relating to the powers of the Court under the first two provisions only. The general words added at the end of the question appear to have no special significance. We would, therefore, proceed to answer the question on those two points.

The facts of the case leading to the controversy may be stated very shortly. The applicant held a permit to ply his stage carriage on a particular route which had been renewed for three years unconditionally according to the applicant. In connection with the nationalisation of a part of the route this permit was cancelled prematurely by the State Government. This cancellation was challenged in a petition under Art. 226 of the Constitution in this Court and a writ of *mandamus* was prayed for requiring the respondents not to interfere with his right to ply the stage carriage on the route and also praying for a writ of *certiorari* quashing the resolution of the Transport Authorities relating to his permit. This petition was ultimately dismissed by this Court on the 6th of March, 1961. The applicant then applied for leave to appeal to the Supreme Court under Art. 133(i) (c) of the Constitution. That certificate has been granted to the applicant and it has been held by this Court that the case is fit one for appeal to the Supreme Court. But the appeal has not yet been lodged due to procedural matters, which are likely to take some time. Along with this application for certificate, the applicant also applied for suitable interim directions to the respondents asking them not

(1) A.I.R. 1952 S. C. 12.

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to interfere in any maner whatsoever with the applicant's right to ply his stage carriage on the route concerned.

When this application for interim orders, was taken up by the Division Bench for consideration, a preliminary objection had been raised by the respondents that the Court did not possess the power to grant the said prayer The applicant thereupon pointed out that the Court could under Order XLV, Rule 13 of the Civil Procedure Code pass suitable orders for preservation of the subject-matter of the appeal, and in the alternative he contended that if the provisions of Order XLV, Rule 13 are not applicable to a proceeding like this, the court has inherent powers under section 151 of the Civil Procedure Code to grant the same. As stated above, the third power pointed out by the applicant under Art. 226 of the Constitution was rejected by the Division Bench and is no more relevant for answering the question.

In these circumstances, this Full Bench has to decide whether the Court has power to grant the interim relief prayed for by the applicant or not. The further question whether in the circumstances of this particular case, the power should be exercised or not, has not been referred to and the answer of this Full Bench will therefore be confined to the jurisdiction of the Court to grant the said relief.

Under chapter XXIII, rule 26 of the Rules of Court the provisions of Order XLV of the Code of Civil Procedure have been made applicable to such application for leave to appeal to the Supreme Court as are not expressly governed by the Code of Civil Procedure and for that purpose Order XLV, Rule 13 of the Civil Procedure Code may be read with the necessary modifications and alterations in order to make it applicable

to a proceeding arising out of a writ petition. But of course, such modifications cannot alter the substance of the rule. The rule runs as follows:

> "Rule 13 (1) Notwithstanding the grant of a certificate for the admission of any appeal, the decree appealed from shall be unconditionally executed, unless the Court otherwise directs.
>
> (2) The Court may if it thinks fit on special cause shown by any party interested in the suit or otherwise appearing into Court—
>
> (*a*) impound any movable property in dispute or any part thereof.
>
> (*b*) . . . . . .
>
> (*c*) . . . . . .
>
> (*d*) place any party seeking assistance of the Court under such conditions or give such other directions respecting the subject-matter of the appeal as it thinks fit by appointment of a receiver, or otherwise."

The contention of the counsel for the applicant is that the provisions of rule 13 (2) (*a*) are wise enough to give powers to this Court to issue any directions respecting the subject-matter of the appeal if the Court considers that it is necessary to preserve the subject-matter of the appeal pending the appeal to the Supreme Court.

Learned counsel for the State contended that Rule 13 read as a whole applies only to a case where an executable decree has been passed and sub-rule (1) states that in spite of an appeal to the Supreme Court the decree shall be unconditionally executed. Sub-rule (2) merely enumerates the circumstances under which execution can be stayed According to him, sub-rule

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(2) cannot be applied to a case where there is no executable decree passed by the court. I am unable to agree with this contention of the learned counsel. The heading of this rule is "powers of the Court pending appeal". Although the heading cannot govern the rule itself but it does indicate in a nutshell the purpose of the rule. The heading does not say that these are the powers relating to execution during the pendency of the appeal. Sub-rule (1) of this rule expressly states as a general rule that the decree shall be executed unless the court otherwise directs. Therefore, it authorizes the Court to restrict the execution or to completely stay execution as it considers proper. After giving that wide power to stay, if the intention was to restrict it only to be exercised in accordance with the provisions subsequently following in sub-rule (2), the language should have been more clear. Moreover, the language of sub-rule (2) does not indicate that these powers are restrictive of the powers given in sub-rule (1). The main body of sub-rule (2) authorizes the Court on special cause being shown by any party interested in the suit, not necessarily the judgment debtor against whom execution is taking place, or even *suo motu*, to exercise any of the powers given in that sub-rule. It is difficult to restrict this wide language only to cases where an executable decree has been passed and some questions arise relating to that execution, clause (*a*) of sub-rule (2) authorizes the impounding of any movable property "in dispute" or any part thereof. It does not relate only to immovable property against which execution is sought. Thus where the immovable property is the subject-matter of dispute, is likely to disappear if no orders are passed. It is open to a Court under this power to suitably preserve that property during the pendency of the appeal to the Supreme Court It will be restricting this power

too much to say that the Court can only exercise it in a case where a decree is being executed against the movable property and in all other cases the Court is powerless to preserve the subject-matter of litigation and must permit it to get destroyed and make the Supreme Court appeal thereby futile.

Clause (*b*) no doubt relates to execution but the purpose of the clause is to authorize the Court to take security from the decreeholder himself before permitting him to execute so that the ultimate decree passed by the Supreme Court may not become infructuous. It is not therefore, a power to alter the normal course of execution but to take security before refusing an order of stay under sub-rule (1). This clause also therefore cannot be read as an exception or a condition under which the general right under sub-rule (1) can be exercised.

Clause (*c*) of sub-rule (2) is just the counterpart of clause (*b*) and authorizes the Court to take security from the judgment-debtor before staying the proceedings. It does not say that the Court cannot stay proceedings unless the judgment-debtor has given security and this clause also gives an additional power of demanding security from the judgment-debtor and is no restriction on the general power given under sub-rule (1).

Lastly clause (*d*) of this sub-rule authorizes the Court, in the first place to place any party seeking assistance of the Court under such conditions as it thinks proper. It has been argued by the respondent that the term "party seeking assistance of the Court" must necessarily be the party which has obtained a decree in its own favour for it alone can seek assistance of the Court for executing that decree and realising the fruits of it. But it may also be noted that a party which has lost a case and comes to the Court for an interim relief also seeks

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assistance of the Court to preserve the subject-matter of the litigation and if it so seeks the assistance of the Court, then the clause authorizes the Court to put such party to terms and grant the assistance after placing it under such conditions as the Court thinks proper. This may be done by the Court either *suo motu* or on the application of the opposite party which is opposing the interim relief. This sub-rule does not say that the person seeking assistance must be placed under conditions on the request of that person himself. In the main body of this rule it is clearly stated that these powers can be exercised at the instance of any party to the litigation or otherwise by the Court itself. Thus there is nothing in the terms of this part of this clause (*d*) to indicate that the party seeking assistance of the Court must be the decreeholder who has obtained a decree from the Court and who is seeking assistance by way of execution There may be cases where a decree has been granted by the trial court and the appeal by the defendant has been dismissed, and in such a case the appellant may seek assistance of the Court for stay of execution. In that case he will not be a decreeholder and the Court may put him to such terms as it thinks proper before granting the prayer which prayer in this case will be granted under sub-rule (*1*) and the conditions will be imposed upon him under this clause (*d*) of sub-rule (*2*). I am, therefore, unable to accept that the term "party seeking assistance of the Court" must necessarily be the decreeholder and in case where a person has lost in appeal can never be a party seeking assistance of the Court.

In any case, this part of the clause is not invoked by the applicant. According to the appellant the second part of this clause (*d*) is applicable to his case. He relies upon the words "or give such other directions respecting the subject-matter of the appeal as it thinks

fit". This second power given under this clause of giving directions respecting the subject-matter of the appeal is not related to the party seeking assistance of the Court. This is a general power. It can be exercised at the instance of any party or by the Court itself and the further words illustrating this power are "by appointment of a receiver or otherwise". These words also indicate that the intention is to authorize the Court to have wide powers to enable it to adjust the equities between the parties and to see that the appeal to the Supreme Court does not become futile and the subject-matter of the litigation does not disappear in the meanwhile. It has to be preserved for the benefit of the party ultimately succeeding.

I, therefore, see nothing in sub-rule (2) of rule 13 of Order XLV, Civil Procedure Code to restrict it to cases where an executable decree has been passed and to my mind it is wide enough to include all cases where there is a property involved in the litigation which can be called the subject-matter of the appeal and any party to the appeal may ask the Court to give such directions respecting the subject-matter of the appeal as it thinks fit.

In this particular case, the contention on behalf of the applicant is that his right of plying his buses is the property which is the real subject-matter of this litigation. The whole litigation is for the purpose of that right and the questions relating to the jurisdiction of the Government to pass the impugned orders is merely ancillary to the real question whether the applicant is entitled to this right of carrying on his business.

Having given my own opinion on this question, I will consider in brief the most important cases which have been relied upon by the State in order to show that Order XLV, Rule 13 of the Civil Procedure Code

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is wholly inapplicable The first case relied is *Lalitesso Singh* v. *Bhabessur Singh* (1). In this case a preliminary partition decree had been passed by the trial court against which an appeal to the High Court had been dismissed and a further appeal to the Privy Council was sought and it was prayed that in the meanwhile preparation of the final decree be stayed. It was held that the Court did not possess such a power under this rule. It was expressly said by the learned Judges that the prayer did not relate either to put in any party under conditions or to the subject-matter of the suit. The prayer merely was for staying of further proceedings which was not authorised by any of the clauses of this rule. That case is therefore, entirely distinguishable and no authority for a case where preservation of the subject-matter of litigation is prayed for.

This Calcutta case was followed by a Division Bench of this Court in *Lala Atma Ram* v. *Beni Pd.* (2). The facts of this case were that a suit had been filed by the Court of Wards on behalf of a Hindu widow which was withdrawn and the reversioner made an application that he be substituted as plaintiff and the suit be continued. This application was dismissed by the trial court. But on revision, the High Court granted the same and directed the suit to proceed with the new plaintiff. Leave to appeal to the Privy Council was granted and an application was made to stay proceedings in the suit. The observation of the learned Judges who constituted this Division Bench regarding Order XLV, Rule 13 clause (*a*) of the Civil Procedure Code was as follows:

> "That sub-rule obviously refers to cases where a party is to be put to certain terms or where other order has to be made regarding the custody or disposal of the subject-matter of the appeal."

(1) (1909) 13 C.W.N. 899. (2) A.I.R. 1934 All. 585.

They then referred to an earlier Division Bench case of this Court in *Ram Narain* v. *Harnam Das* (1) and the Calcutta case mentioned above and agreed with the observation in those two cases that this rule did not authorise the staying of proceedings in the Court below. Thus the Calcutta case as well as these two Division Bench cases of this Court are wholly inapplicable to the facts of the present case. In these cases proceedings were sought to be stayed and it was merely said that there was no power to stay proceedings in the Court below. That is not the question in this case.

Reliance was then placed on the case of *Rajahmundry E. S. Corporation* v. *State of Madras* (2). In this case the interim relief which was prayed for was that the Court may grant stay of the operation of a certain Government order directing vesting of the petitioner Corporation pending disposal of the appeal to the Supreme Court. The learned Judges of the Madras High Court observed that the applicant was in effect asking for an injunction restraining the State from taking action in pursuance of the order passed by it directing vesting of the Corporation in the State. It appears that there was no question in that case relating to preservation of any property which was the subject-matter of that litigation or at least the case was not considered from that point of view. While observing that this rule authorized the Court to give such other directions that is to say, directions placing a party under any condition or respecting the subject-matter of the appeal as for instance, by an order directing appointment of a receiver, they proceeded to hold that the provisions did not enable the Court to give any direction to the successful party by way of restricting or preventing it from exercising the rights to which it has become entitled under the final order of the Court. An earlier

(1) (1919) I.L.R. 42 All. 170. (2) A.I.R. 1953 Mad. 475

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Division Bench decision of the same Court in *Ramanathan Chettiar* v. *M. A. R. R. M. Vishwanathan Chettiar* (1) was distinguished on the ground that in that case the execution of the final decree was sought to be stayed although the appeal to the Supreme Court was against the preliminary decree. This case has not decided whether or not a Court can pass suitable orders to preserve the property which is the subject-matter of the litigation pending appeal to the Supreme Court under this rule. It may also be that probably no question of an any damage to the subject-matter of litigation could arise in that case. The Government under the order was taking over the Electric Supply Corporation and would have continued to run it. If the Supreme Court appeal was granted, the Corporation would again take it back.

On the other hand, a Division Bench of this Court in *Girja Pd. Sunderlal* v. *Divisional Forest Officer, Dudhi* (2) held that the Court can restrain the opposite party from interfering with the petitioner's right during the pendency of his application for a certificate under Art. 133. The question whether the power can be exercised during the pendency of the application for a certificate before a certificate has been granted or not, is not before us and it is not necessary to go into that aspect of the case. Here a certificate has already been granted. In this case the learned Judges held that the second part of clause (*d*) was independent and wide enough to issue any directions relating to the subject-matter of the litigation. With this observation I entirely agree with respect.

It was also argued that in any case the proceedings in a writ petition cannot be said to involve the question relating to property or status. The object behind a

(1) I.L.R. (1939) Mad. 135. (2) 1955 A. L. J. 838.

writ of *certiorari* or prohibition or *mandamus* or injunction etc. is simply to keep the Courts and Tribunals within the limits of their jurisdiction and to compel them to exercise jurisdiction when it is necessary to do so. But it cannot be lost sight of that the party which comes to challenge a particular order of the Government may do so for the purpose of protecting its own right in certain properties and in such a case, the whole purpose of the writ is to protect the property and that property would be the subject-matter of litigation. The Court gives relief only in a case where the Government or the Tribunal has travelled beyond its jurisdiction in depriving the party of that property but that does not mean that there is no subject-matter of the litigation or that the jurisdiction of the Government or the Tribunal is the only subject-matter of a writ proceeding.

On a consideration of the whole question I would answer the first part of the question referred to this Full Bench by saying that this Court has jurisdiction in a proper case to grant an interim relief relating to the party seeking to appeal to the Supreme Court under Order XLV, Rule 13 of the Code of Civil Procedure.

The other part of the question whether this Court has power under section 151 of the Civil Procedure Code to grant an interim relief, it may be shortly said that under that section powers can be exercised as may be necessary in the interest of justice or to prevent abuse of the process of the Court. There is no question of abuse of the process of the Court in a case like this and where express power has been given under order XLV, Rule 13 of the Civil Procedure Code, there is no scope for exercising powers in the interest of justice under this section. I would, therefore, answer this part of the question in the negative and hold that there is no power under section 151 of the Civil Procedure Code

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to grant an interim relief after a certificate of fitness for appeal to the Supreme Court has been granted.

DESAI, C. J :—I had the advantage of reading the judgment of my brother JAGDISH SAHAI and I agree with him that the question should be answered in the negative and that the petitioner should pay costs of the respondents. Order 45, Rule 13 (2) (*d*) does not apply; I have given my reasons for this view in *State of Uttar Pradesh* v. *Mukhtar Singh* (1) and have very little to add. The words "give such other direction" must be interpreted as analogous to placing any party seeking the assistance of the Court under conditions and clause (*d*) comes into operation when a party seeks the assistance of the Court and then either conditions may be imposed upon him or such other direction as appointment of a receiver may be given. The words "party seeking the assistance of the Court" do not refer to the party to whom a certificate has been granted granting the certificate is not granting him the assistance of the Court. The clause comes into operation after a certificate has been granted and applies when after the grant of a certificate a party seeks the assistance of a Court in one way or another. Here the petitioner sought the assistance of the court by seeking a certain interim relief and if the relief is granted to him, it may be granted on conditions or subject to a direction respecting the subject-matter of the appeal. Whether the interim relief should be granted to him or not is an entirely different matter not dealt with by the clause. The only clause that might apply is clause (*c*), but the interim relief that is sought is not covered by it.

The order under appeal to the Supreme Court is an order refusing to issue *certiorari* to quash certain notifications published under section 68-C of the Motor Vehicles Act and *mandamus* commanding the State and others not to interfere with the petitioner's right to ply

(1) A.I.R. 1937 All. 505.

his motor vehicle on a certain route. There arises absolutely no question of staying the execution of the order under appeal an order refusing to issue *certiorari* or *mandamus* is not an order capable of execution. What the petitioner really requires is a positive relief and not a relief against the operation of the order appealed from. Order 45, Rule 13, does not empower the court to grant such interim relief. I further agree with my learned brother that the subject-matter of appeal is the refusal of this Court to grant *certiorari* or *mandamus;* no practical direction in respect of this refusal can be granted.

I also agree with by learned brother that section 151 Civil Procedure Code also is not applicable.

I had the advantage of reading the judgment of my brother BISHAMBHAR DAYAL also, but with great respect I do not agree with it

BY THE COURT—In view of the majority opinion of the Judges constituting this Bench, we answer the question referred to us in the negative and hold that the Court has no jurisdiction to grant interim relief to the petitioner, which he has prayed for, either under Order XLV, Rule 13 or section 151, Civil Procedure Code. The petitioner shall pay the costs of the respondents in this case.

Question answered negatively.

(FULL BENCH) APPELLATE CIVIL

Before the Honourable M. C. Desai, Chief Justice, Mr. Justice Mukerji and Mr. Justice Dwivedi

KAILASH CHANDRA JAIN AND OTHERS
(APPELLANTS)

v.

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May, 19

STATE OF UTTAR PRADESH AND OTHERS
(RESPONDENTS)

Constitution of India, *Art, 226 and U. P. (Temporary) Control of Rent and Eviction Act,* 1947, *ss.* 3 *and* 7F—*Magistrate rejecting application for permission to institute suit for eviction—Revision dismissed by the Commissioner —Whether the State Government bound to send for the record of the Revisional Court exercising power under s.* 7F *of the Act.*

Held, that sending for the record is not a condition precedent to the passing of the order under s. 7F; the word 'may' is used in the section in the permissive and not in the mandatory sense.

It is no doubt desirable that the State Government should also send for the record of the revision, but on the view taken, it cannot be said that the State Government acted illegally in not sending for the record of the case before the Additional Commissioner.

The argument that the order of the District Magistrate is merged in the order of the Commissioner and therefore the record of the court of revision alone survives is not correct. Even though there may be a merger of one order with another, there is no merger of the record in which the two orders are passed.

An order of the Commissioner dismissing a revision against the order of the District Magistrate granting or refusing permission is not an order 'granting or refusing permission'. The question of merger of orders therefore does not arise.

Further it has not been explained how the appellant was prejudiced by the State Government's not summoning the record of the Commissioner's court. Under the circumstances the Court is not bound to quash the order of the State Government.

No opinion was expressed on the argument that the District Magistrate alone and not the State Government had the power to grant permission to file a suit for ejectment. This question should more properly be raised before the Court which is seized of the suit.

Sri Letanal v. *Srimati Momini Bala* (1) and *Rabindra Nath Misra* v. *State of U. P.* (2) dissented from

Special Appeal no. 501 of 1959 from a decision of MATHUR, J., dated the 14th September, 1959 in Civil Miscellaneous Writ no. 1358 of 1959.

The facts appear in the judgment.

S. N. Kacker, for the appellant.

Standing Counsel for the State.

DWIVEDI, J.:—House no. 12, Sheocharanlal Road, Allahabad, belongs to Behari Lal, the 4th respondent. K. C. Jain, the 1st appellant, occupies as tenant the residential portion on the first floor. The 2nd and 3rd appellants occupy portions on the ground-floor. One Beharilal, barber, was tenant of another portion of the house. He is dead, and we are not concerned with him in this case. Sometime in 1956 the 4th respondent applied under section 3 of the U. P. (Temporary) Control of Rent and Eviction Act (hereinafter called the Act) to the Additional District Magistrate for permission to institute a suit for evicting all the said tenants from the house. On 30th May, 1957 his application was rejected and on 27th July following his revision was also dismissed by the Additional Commissioner. He however succeeded in obtaining an order from the State Government under section 7F of the Act permitting him to institute a suit for the appellants' ejectment. That order was made on 26th December, 1958. Then on 14th February, 1959, the appellants applied to the State Government for a review of its order. Their applications were rejected on 1st May, 1959.

(1) Special Appeal no. 24 of 1960, decided on 11th February, 1960. (2) 1954 A.L.J. 263.

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Before the appellants moved in Court the writ petition out of which this appeal has arisen, the 4th respondent had instituted in the court of the I Additional Munsif, Allahabad, suits for their ejectment from the house.

At the hearing of the writ petition three questions of law were mooted on behalf of the appellants : (1) since the State Government did not send for the record of the Additional Commissioner, it had no power to make the impugned order under section 7F, (2) the State Government could not consider any facts, which were *de hors* the records of the Additional District Magistrate and the Additional Commissioner, and (3) the State Government misapprehended that it had no power to review its order.

The learned Judge, who heard the petition, answered all the questions against the appellants and dismissed their petition. They then filed the present appeal against his order. It was heard by MOOTHAM, C.J. and SRIVASTAVA, J., and by their order, dated 7th September, 1960, they referred it to a larger Bench for decision, as they entertained considerable doubt as to the correctness of the view taken by another Bench in *Sri Letomal* v. *Srimati Mohini Bala* (1) (Special Appeal no. 24 of 1960, decided on 11th February, 1960)'. We shall advert to that decision later in our judgment.

In the present case the entire record of the case before the Additional District Magistrate was before the State Government. It is also not in dispute that the State Government did not send for the record of the revision before the Additional Commissioner. Copies of the grounds of revision before him and of his order were admittedly before the State Government, but other documents, which were comprised in the

(1) Special Appeal no. 24 of 1960, decided on 11th February, 1960.

record of the revision were not called for by the State Government.

On these simple facts learned counsel for the appellants ask us to quash the order of the State Government. According to him the State Government could not act under section 7F without first sending for the record of the revision before the Additional Commissioner.

This argument was not accepted by the learned Judge. It was left undecided in *Latomal's* case (1).

Section 7F of the Act may now be set out :—

> "The State Government may call for the record of any case granting or refusing to grant permission for the filing of a suit for eviction referred to in section 3 or requiring any accommodation to be let or not to be let to any person under section 7 or directing a person to vacate any accommodation under section 7A and may make such order as appears to it necessary for the ends of justice."

The first thing that strikes the reader is that the State Government cannot call for the record of each and every case; its power is limited to a case 'granting or refusing to grant permission for the filing of a suit for eviction referred to in section 3' or a case 'requiring any accommodation to be let or not to be let to any person under section 7' or a case 'directing a person to vacate any accommodation under section 7A'. Besides these three cases the State Government cannot call for the record of any other case arising under the Act. The next striking feature of the section is its unskilful drafting, for it is difficult to conceive of a case 'granting or refusing . . . . . or requiring . . . . . or directing a person . . . . . The act of 'granting or refusing . . . . . or requiring . . . . . or directing' can be performed

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only by a person or an authority. One is therefore constrained to read some words after the word 'case', which are not already there, in order to make the section intelligible. I think some such words should be read after the word 'case' as 'in which an authority has made an order'. I have little doubt in my mind that the Legislature intended that the State Government should be empowered to call for the record of only that case in which an order 'granting or refusing . . . . . or requiring . . . . . or directing . . . . .' has been made by some authority. The true intention of the Legislature must be given effect to by the Court.

If the section is to be read as I think it ought to be, then it would follow that the State Government may call for the record of that case only in which an order granting or refusing to grant permission for filing of a suit for eviction has been made by an authority. I have omitted the other two types of cases for we are not concerned with them in this appeal. Now, when an application for permission to institute a suit for eviction is made to the District Magistrate, he may either grant or refuse such permission. In either event a revision may be taken to the Commissioner. He may allow the revision and refuse or grant permission as the case may be, or dismiss the revision. He may also allow the revision and remand the case to the District Magistrate for deciding it according to law. When he allows the revision and grants or refuses to grant permission, I think that the proceedings before him constitute a 'case' within the meaning of section 7F. When he allows the revision against an order granting permission to sue, the proceedings may perhaps be again a 'case', for it may be said that he has, in effect, refused permission to sue. But where he allows the revision and remands the case to the

District Magistrate for rehearing, I doubt if it can be said that he has granted or refused permission to sue. And where he upholds the order of the District Magistrate granting or refusing permission and dismisses the revision, I have no doubt in my mind that the proceedings do not constitute a 'case' within the meaning of section 7F, because he has not passed any order either granting or refusing permission; he has only declined to interfere with the order of the District Magistrate. There is a decisive difference between the language of section 115 of the Code of Civil Procedure and section 7F; in the former the Court has the power to call for the record of a case which has been decided by a subordinate court, so that even an order dismissing an appeal may be a case; but in the latter the 'case must not be one merely decided by an inferior authority but it must be a case in which an inferior authority has passed an order granting or refusing permission'.

The State Government may call for the record of a case in which an authority has passed an order directing a person to vacate an accommodation under section 7A. If such an order of the District Magistrate is set aside in revision by the Commissioner, it cannot be said that he has passed any order directing a person to vacate an accommodation, and his order cannot be interfered with by the State Government under section 7F. If his order is irrevokable by the State Government, I think it naturally follows that it cannot send for the record of the case before him. This inference lends support to the view that I have already taken. It is no doubt desirable that the State Government should also send for the record of the revision, but on the view that I am taking, it cannot be said that the State Government acted illegally in not sending for the record of the case before the Additional Commissioner, who had dismissed the revision of the

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4th respondent against the order of the Additional District Magistrate refusing him permission to sue.

It is argued on behalf of the appellants that when the Commissioner passes an order either allowing or dismissing the revision, the order of the District Magistrate is merged in his order, and there then survives only the record of the case before the Commissioner. For his argument he relies upon *Hafiz Mohammad Yusuf* v. *The Custodian General, Evacuee Properties, New Delhi* (1), *Rabindra Nath Mitra* v. *The State of U. P.* (2) and *Commissioner of Income-tax* v. *Amritlal Bhagilal* (3). These cases turned on their own law, and are not helpful in the case here. If under section 7F the State Government could call for the record of any case decided by an inferior authority, the argument might have been attractive, but under the section the power of calling for the record is exercisable only in relation to a case in which an order granting or refusing permission has been passed and I have already said that an order of the Commissioner dismissing a revision against the order of the District Magistrate granting or refusing permission is not an order granting or refusing permission. On this view the question of merger of orders can scarcely be said to be germane. Moreover the doctrine of merger, which applies to certain types of orders, does not extend to records. No authority has been shown in support of the proposition that the record of the case before the inferior authority also merges in the record of the case before the appellate or revising authority.

I am also not impressed by the argument that the sending for the record of a case is the condition precedent to the exercise of power under section 7F. The argument assumes that 'may' means 'shall'. 'May' ordinarily means 'may' and should be read here as

(1) 1954 A.L.J. 114. (2) 1959 A.L.J. 268.
(3) 1959 A.L.J. 713.

'may'. The context and object of section 7F do not compel substitution of 'may' by 'shall'. 'May' is used twice in section 7F, and it is not disputed that second time it is not used as 'shall'. The first 'may' is in my view also used in the same sense as the second one. The section confers power on the State Government; it is an enabling provision like section 115 of the Code of Civil Procedure, and the State Government is not bound to exercise the power in all cases. The power is discretionary, and like all other discretionary powers its exercise may depend on the circumstances of each case. I am of the view that the first 'may' is used in a permissive and not mandatory sense.

Section 7F contemplates two stages. At the first stage the State Government has to take a tentative decision whether it should at all review the decision of the inferior authority; the second stage begins after it has decided tentatively in favour of reviewing the decision. Then it examines the pros and cons of the case, weighs the circumstances and facts for and against parties, considers the law, if material and then makes up its mind finally whether it is in the interests of justice to overturn the order of the inferior authority. Now, if the word 'may' is not used in a compulsion sense at the first stage, it is difficult to comprehend the logic of the argument that at the second stage it should be interpreted to have been used in a mandatory sense, that the record of a case must be sent for at this stage. It is either permissive or mandatory at both stages; it cannot be directory at one stage and mandatory at another stage. A word cannot, I think, have two meanings at the same place and in the same sentence. Further, the expression 'may call for the record of a case' has, I think, now become a term of art to connote the revisional or superintending nature of the power conferred on an authority as contradistinguished from the appellate power. I cannot recall

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any instance of a law, and none has been cited before us, to bear the argument that the expression is used to mean the actual sending for of the record of a case before exercising power. Indeed this Court has often disposed of revisions without sending for the record at all. If sending for the record were a condition precedent, it could not do so. And what this Court itself has done should a *fortiori* be permitted to the State Government under similarly worded section 7F. It is now well-known that the genesis and growth of administrative tribunals and authorities in modern times is traceable to the legislative desire of obtaining cheap and quick settlement of disputes, which is difficult in the court-room largely, if not mainly, on account of its unduly cumbersome, slow and expensive procedure. The procedure before administrative tribunals and authorities is characteristically simple, informal, flexible, and shorn off empty ritualism. To say then that the sending for of the record of a case is the condition precedent to the passing of an order under section 7F is to overlook the ontogenesis of the administrative process and deny it its characteristic feature without any clear legislative mandate.

In my view the sending for of the record is not the condition precedent to the passing of an order under section 7F; the word 'may' is used in the section in the permissive, and not in the mandatory sense.

The practical bearing of the distinction between a mandatory and permissive provision is only this that while the former must be strictly observed, the latter should be complied with substantially. If an order is made without substantial compliance with the permissive provision, and if prejudice has thereby been caused to any person, the order may be avoided at the instance of that person. Thus if neither the record of

the case nor the substance of the information contained in the record is placed before the State Government before it passed an order under section 7F, the person, who is prejudiced thereby, may invoke the aid of the court to avoid the order. But if he is not so prejudiced, he can have no just cause for complaint and the Court should decline to assist him. I am accordingly of the view that *Latomal's* case, wherein prejudice was assumed, was rightly decided. There the Court quashed the order under section 7F for some material on record was never examined by the State Government.

In *Rabindra Nath Mitra* v. *The State of U. P.* (1), JAMES, J. has taken a contrary view. In his opinion the sending for of the record of a case is the condition precedent to the valid making of an order under section 7F. With respect I am unable to share his opinion for the reasons that I have already stated. I express no opinion as to the correctness of the order on merits in that case. For my purpose it is enough that the facts of that case are radically different from the facts of the present case.

Assuming for argument's sake that the Additional Commissioner's record should also have been seen by the State Government before making the order, it is to be seen whether the failure to do so has caused any prejudice to the appellants. It is no longer in dispute that the entire record of the case before the Additional District Magistrate, the memorandum of revision and order of the Additional Commissioner were used by the State Government before making the impugned order. The only material, which formed part of the Additional Commissioner's record and was never placed before the State Government, consisted of four documents, which would show that the 4th respondent had

(1) 1959 A.L.J. 263.

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been ejected from the House no. 17, S. C. Basu Road on the strength of a permission to sue granted by the Rent Control and Eviction Officer to the landlord because of his personal need for the house, and not because of the 4th respondent had asked for permission to sue for the appellant's ejectment from his house on the ground that a similar permission had been granted to the landlord of 17, S. C. Basu Road, which he was occupying as tenant. The Additional District Magistrate appears to have refused to grant him permission, because he thought that the 4th respondent, not having paid rent, was himself responsible for the order permitting his landlord to sue for his ejectment. He did not therefore take into consideration the circumstance that he was about to be ejected from 17, S. C. Basu Road. In revision before the Additional Commissioner the 4th respondent filed the said four documents to prove that he was not blameworthy and that permission was given to his landlord on the ground that the latter needed the accommodation for his own use. Those documents, if they were before the State Government at the time of passing the impugned order, would, I think, have helped the 4th respondent and not the appellants. Accordingly I am of opinion that no prejudice has been caused to them by the omission of the State Government to send for the Additional Commissioner's record. They cannot therefore avoid the order of the State Government.

It was then urged on behalf of the appellants that the State Government illegally let in some new evidence regarding another house known as Sultanpur Bhawa and that its order is accordingly invalid. It is rather a technical objection, and cannot be accepted. I think that section 7F does not debar the State Government from considering new facts and circumstances before passing an order. Indeed sometimes it may be

its clear duty to do so in the 'interests of justice'. Further, no prejudice is shown to have been caused to the appellants.

Another argument is that the State Government has illegally refused to exercise the power of review which it undoubtedly has. When the State Government granted permission to the 4th respondent, the appellants applied for review. By letter, dated 1st May, 1959, they were informed that it was not possible to make any change in the order (*koi bhi parivartan karna sambhav nahin hai*). I do not think that this order can be construed to mean refusal to exercise the power of review. To my mind, it really means that the State Government, having reconsidered the matter, could not see its way to changing the order. In other words it has rejected the review application after considering the merits. If the State Government had taken the view that it had no power of review, it would have used instead of the word '*sambhav*' the word '*shakti*' or '*chhamta*', which means power or capacity.

The last argument is that a suit for ejectment can be instituted only with the permission of the District Magistrate, and that the State Government has no power to grant such permission. I would express no opinion on this question, for I think that it should more properly be raised before the court which is seized of the suit for ejecting appellants. It will be for that court to decide the question in the first instance.

Learned counsel for the 4th respondent said that the writ petition was liable to be dismissed for great delay. The order of the State Government was made on 26th December, 1958, and the writ petition was filed in Court on 14th May, 1959. This argument was not urged before the learned single Judge, who heard the petition on merits. I think it is now too late to raise the point. If the point had been raised before him,

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the appellants would have received an opportunity of producing evidence to explain the delay. If we now allow the point to be raised, it is likely to prejudice them. It may also be said that the 4th respondent waived this objection

For the reasons stated above I would dismiss the appeal with costs.

MUKERJI, J.:—I agree and do not have anything very useful to add.

DESAI, C.J.:—I agree with my brother DWIVEDI that the State Government revised under section 7-F an order passed by the Additional District Magistrate and not the order passed by the Commissioner under section 3(3) refusing to revise it. The record of the case before the Additional District Magistrate was summoned by the State Government and the requirement of section 7-F was fulfilled The permission to file a suit was refused by the Additional District Magistrate. It cannot be deemed to have been refused by the Commissioner even though he confirmed it. The power of section 7-F is to be exercised against an order refusing to grant permission for the filing of a suit and it was the Additional District Magistrate who refused it and not the Commissioner. The Commissioner's jurisdiction was to revise the Additional District Magistrate's order if he found that he had acted illegally, incorrectly, improperly or with irregularity. He did not act as an appellate court. Consequently the State Government was required, if at all, to send for the record of the Additional District Magistrate's Court and not that of the Commissioner's.

There is no question of applying the doctrine of merger. In the first place the Commissioner does not exercise powers as an appellate authority; his jurisdiction to interfere with the order is restricted to interference on the ground of acting illegally or with

material irregularity or wrongful refusal to act. He has no jurisdiction to go into other matters and, therefore, when he finds that the District Magistrate did not act illegally or with material irregularity or did not wrongfully refuse to act, it cannot be said that the Additional District Magistrate's order merges in his order. I receive considerable support for my view from *Harimal Oil Mills* v. *Assistant Collector, Central Excise* (1) where it was laid down by DIXIT, C.J. that the doctrine of merger of orders cannot be applied to administrative orders In *Dwarka Nath* v. *Gayatri Devi* (2). I said that a permission on the basis of which a civil court can take cognizance of a suit for ejectment can be granted only by the District Magistrate. Unless there are two permits, there cannot arise any question of merger. Consequently when a Commissioner refuses to interfere with the District Magistrate's order granting a permission, his order does not merge with the permission granted by the District Magistrate. Finally, as my learned brother has pointed out, the question is what records should be called for and not whether one order merges in another or not. Even though there may be a merger of one order with another, there is no merger of the records in which the two orders are passed.

With great respect I do not think that any question of interpreting the word 'may' arises at all. The word 'may' used in the first instance cannot possibly mean 'shall' : The State Government cannot be forced to call for the record in every case decided by a Magistrate; the matter is at its discretion and the word "may" was the only appropriate word that could be used. The objection of the appellants is not that the word "may" means "shall" but that the State Government cannot make an order unless it first calls for

(1) A I R. 1961 M.P. 148. (2) I.L.R. [1961] 1 All.

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the record. What was argued is that the calling for the record was a condition precedent to the exercise of the power conferred by section 7-F not that the Government must call for the record in every case but that if it wants to exercise the power under section 7-F, it must. The contention was that either both the acts (of calling for the record and making an order) may be done or neither. I do not agree with this contention. Calling for the record is only a procedural step and not a condition precedent to the exercise of jurisdiction. The jurisdiction of the State Government to make an order is not derived from the calling for the record. Not calling for a record is only a procedural irregularity which is not fatal. Section 7-F only requires the record to be called for; it does not lay down what the Government should do to it after it receives it. The Government may not peruse it at all even though it receives it and yet can pass an order, which will be fully valid. If it can pass a valid order even without perusing the record, it does not stand to reason that it cannot pass a valid order without sending for the record.

Even if it be said that the calling for the record is a condition precedent to the making of an order, I am not bound to quash the order of the Government. If I find that no prejudice has been caused, I will be justified in refusing to quash it. It has not been explained how the appellant was prejudiced by the State Government's not summoning the record of the Commissioner's Court. There was no matter required by the law to be considered by the Government before making an order and consequently it cannot be said that by not calling for the record it failed to consider a certain matter and thereby caused prejudice to the appellants. A Commissioner is not required to send for the record and if he can pass an order under section

9(3) without sending for the record of the District Magistrate's Court, it should not be held that the Government's passing an order under section 7-F without calling for the record is prejudicial to the appellants. The Government before passing the order sent for a report from the Additional District Magistrate and heard the appellant's counsel; so the appellants had full opportunity of bringing to its notice any relevant matter that might have been on the record of the Commissioner's Court.

A suit has already been instituted on the basis of the permission granted by the Government and even if we quash the permission, the suit will go on and can be decreed, as held by this Court in *Dwarka Nath* v. *Gayatri Devi* (1). No useful purpose will, therefore, be served by our quashing the permission granted by the State Government.

The appeal should be dismissed with costs.

Appeal dismissed.

(1) I.L.R. [1961] 1 All.

CIVIL MISCELLANEOUS

Before the Honourable M. C. Desai, Chief Justice and Mr. Justice Dwivedi

RAMESHWAR DAYAL (APPLICANT)

v.

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SUB-DIVISIONAL OFFICER, GHATAMPUR AND OTHERS (OPPOSITE-PARTIES)

Civil Procedure Code, 1908, *ss.* 94, 151, *O. XXXIX and XLI, construction of—U. P. Panchayat Raj Act,* 1947, *s* 12-C *and R.* 25—*Construction of—Power of Sub-Divisional Officer—Power and procedure, distinction of—Sub-Divisional Officer whether can stay transfer of charge pending disposal of election petition—Interpretation of Statutes—Implied power, meaning of—Election Tribunal, whether a court—Inherent powers of a court whether available to an Election Tribunal.*

By s. 12-C, U. P. Panchayat Raj Act a Sub-Divisional Officer has in the matter of (i) hearing of an election petition and the procedure to be followed at such hearing, (ii) setting aside an election or declaring the applicant to be duly elected, or any other relief that may be granted to the petitioner, such powers and authority as may be prescribed

Rule 25 of the Rules framed under the Act provides that an election petition is to be tried in accordance with the procedure applicable under the Code of Civil Procedure to the trial of suits.

Where the petitioner in an election petition challenging the election of a Pradhan prayed for an interim relief that the petitioner may not be removed from office of Pradhan which he had been holding and the charge may not be transferred from him, the Sub-Divisional Officer refused the prayer on the ground that he had no jurisdiction to stay transfer of charge.

On a petition filed by the petitioner under Art. 227 of the Constitution of India challenging the order of the Sub-Divisional Officer *inter alia* on the grounds that he had the jurisdiction to grant the relief under s. 151 and O. XXXIX, Code of Civil Procedure and further that it had the power to do so under the principles of implied power.

Held, that the Code of Civil Procedure prescribes the procedure for the trial of suits and also confers various incidental powers upon the courts trying the suits. Rule 25 of the U. P. Panchayat Raj Rules, makes only those provisions of the Code of Civil Procedure applicable to the hearing of election petitions which relate to the trial of suits. It does not confer

upon the Sub-Divisional Officer all the powers that are conferred upon a court by the Code of Civil Procedure.

The expression "procedure applicable to the trial of suits" in rule 23, does not include a power to issue an injunction or grant a stay order.

There, exists, a distinction between 'procedure' on the one hand and 'power', 'jurisdiction' and 'authority' on the other.

An election petition being a purely statutory proceeding unknown to common law, such powers as are contained under s. 151 and O. XXXIX, Code of Civil Procedure can be exercised by an election tribunal only if they have been conferred upon it by a statute. There being no provision in the U. P. Panchayat Raj Act conferring such powers on the Sub-Divisional Officer he could not exercise them.

The inherent power of court to do justice and to pass any orders which it considers necessary in the interest of justice irrespective of whether express provisions of the laws of procedure provide for it or not, is also not available to an election tribunal in that it is not a court and possesses no common law powers. An election tribunal can pass only such orders as the provisions of the Act under which it is created, provide for.

The principle of implied power which authorises the doing of all things necessary for the enforcement of an order refers to the execution of an order already passed. It does not refer to a power to be exercised in anticipation of an order which may subsequently be passed. The power of the Sub-Divisional Officer to declare a vacancy or declare the petitioner to be duly elected does not mean that before such a declaration is made he can direct the petitioner to remain in office or restrain the opposite-party from performing his duties.

The Sub-Divisional Officer consequently had no jurisdiction to stay the transfer of charge pending the disposal of the election petition.

The petition was accordingly dismissed.

Case-law discussed.

Civil Miscellaneous Application no. 198 of 1961, under Article 227 of the Constitution of India.

Gopi Nath, Triloki Nath, Jagdish Swarup and *S. C. Khare*, for the applicant.

The Advocate-General (*K. L. Misra*), *N. C. Upadhya* and *B. P. Agarwal*, for the opposite-parties.

The judgment of the Court was delivered by—

DESAI, C.J.:—This is a petition under Article 227 of the Constitution for the quashing of an order passed

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by opposite-party no. 1 and for a direction to him to stay transfer of the charge of the office of Pradhan to opposite-party no. 2 and not to remove the petitioner from the office of Pradhan during the pendency of an election petition filed by him against the election of opposite-party no. 2 as Pradhan. On 4th May, 1961 we dismissed the petition and said that the reasons for dismissing it would be placed on record later. We now give the reasons for our order.

The petitioner was elected as Pradhan of a Gaon Sabha in 1955. The next election for the office of Pradhan was held in December 1960; opposite-party no. 2 and the petitioner contested the election, and opposite-party no. 2 was declared elected. The petitioner filed an election petition in the court of opposite-party no. 1 challenging the election of opposite-party no. 2 on various grounds. He also applied to opposite-party no. 1 for not transferring the charge of the office from the petitioner to opposite-party no. 2 pending disposal of the election petition, but the opposite-party no. 1 dismissed his application on the ground that he had no jurisdiction to stay transfer of charge. It is this order of opposite-party no. 1 that the petitioner seeks through this petition to be quashed. When this Court admitted this petition it directed that until further orders the petitioner would not be removed from the office of Pradhan, with the consequence that the petitioner continued to hold the office of Pradhan till 4th May, 1961.

A Pradhan of a Gaon Sabha is elected by its members and his term commences on the date of the constitution of the Gaon Panchayat, or on the date of his election, whichever is later, and expires with the term of the Gaon Panchayat; vide section 11B of the Panchayat Raj Act. The election of a person as Pradhan cannot be called in question except by an application presented to the prescribed authority on the ground that the

election had not been a free election for a certain reason, or that it had been materially affected by the improper acceptance or rejection of a nomination, or by gross failure to comply with the provisions of the Act; vide section 12-C. An application to question the election (which would be referred to as an election petition henceforth) may be presented by any candidate at the election or by an elector. Sub-section (4) of section 12-C reads as follows :

> "The authority to whom the application under sub-section (1) is made shall, in the matter of—
>
> (i) hearing of the application and the procedure to be followed at such hearing,
>
> (ii) setting aside the election or declaring the applicant to be duly elected or any other relief that may be granted to the petitioner,
>
> have such powers and authority as may be prescribed."

The word "prescribed" means prescribed by the Act or rules made thereunder; see section 2(*p*). A Pradhan may resign his office and thereupon his office shall become vacant; vide section 12-F. If a vacancy in the office of Pradhan arises by reason of his death, removal or resignation or avoidance of his election it has to be filled for the remainder of his term in the manner provided for a regular election; *see* section 12-H. Though the term of a Pradhan expires with the term of the Gaon Panchayat he continues in office until his successor is elected; vide *see* section 12-K. The term of a Gaon Panchayat is five years as laid down in section 12.

Section 110 of the Act empowers the State Government to make rules to carry out the purposes of the Act, and in particular to provide for the presentation and disposal of election petitions, taking of oath by

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Pradhan, etc. Rules made by the State Government regarding election of Pradhan are contained in Chapter I-E of the Panchayat Raj Rules. Rule 20-I provides that when there is only one contesting candidate the Returning Officer shall forthwith declare him "to be duly elected". If a poll takes place, rule 21-Q requires him to declare a candidate securing the largest number of votes "as elected". Rules regarding election petition are contained in Chapter I-F. Rule 25 lays down that, subject to the provisions of the Act and the Rules, every election petition will "be tried by the sub-divisional officer, as nearly as may be, in accordance with the procedure applicable under the Code of Civil Procedure, 1908, to the trial of suits". He may summarily dismiss the petition on finding, after hearing the petitioner or his counsel, that it has no substance. He may maintain only a minimum of the evidence and not a full record of it. After hearing the petition if the sub-divisional officer finds that the election of the opposite-party was valid he must dismiss it, and if he finds that the election was invalid he must either declare a casual vacancy to have been created or declare another candidate to have been "duly elected". This is all the law regarding election petitions. It will be seen that neither the Act nor the rules contain any provision expressly authorizing a sub-divisional officer hearing an election petition to grant any interim relief for the duration of the petition.

Sri *Gopi Nath* contended that a sub-divisional officer has got all the powers conferred upon courts by sections 94 and 151, and Order XXXIX, rule 2, and Order XLI, rule 5, Civil Procedure Code. For this proposition he relies upon section 12-C(4) and rule 25 referred to above. A sub-divisional officer has only such powers in respect of the hearing of the election

petition and the procedure to be followed at the hearing as may be prescribed by the State Government, and rule 25 contains the prescribed powers. The only power conferred upon him is to try the petition in accordance with the procedure applicable under the Code of Civil Procedure to the trial of suits. All that is meant by rule 25 is that an election petition is to be tried as if it were a suit, i.e. that those provisions of the Code of Civil Procedure which relate only to the trial of suits will be followed by the sub-divisional officer when hearing the petition. Though the Code of Civil Procedure lays down rules of procedure, it does more than laying down the procedure for the trial of suits; it also confers various incidental powers upon the courts trying suits. Rule 25, however, applies only those provisions of the Code which relate to the trial of suits to the trial of election petitions; in other words, it does not confer upon a sub-divisional officer all the powers that are conferred upon a Court by the Code of Civil Procedure. This is quite consistent with section 12-C(4); the State Government is competent to prescribe the powers only in respect of the hearing of an election petition and the procedure to be followed at the hearing.

Section 90 of the Representation of the People Act, 1951, is to the effect that every election petition "shall be tried by the Tribunal, as nearly as may be, in accordance with the procedure applicable under the Code of Civil Procedure, 1908 to the trial of suits", and section 92 is to the effect that—

> "The Tribunal shall have the powers which are vested in a Court under the Code of Civil Procedure, 1908, when trying a suit in respect of the following matters:
>
> (*a*) discovery and inspection,
>
> (*b*) enforcing the attendance of witnesses, etc.

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The fact that section 92 was enacted conferring certain powers in respect of the discovery and inspection and enforcing attendance of witnesses, etc., even though the Tribunal was already empowered by section 90 to try the election petition as if it were a suit, shows that the trial of the petition did not include such matters as discovery and inspection, enforcing attendance of witnesses etc. The Code of Civil Procedure does contain provisions in respect of the matters enumerated in section 92, and if the election tribunal had been invested by section 90(2) with all the powers conferred upon the courts by the Code of Civil Procedure, section 92 would have been wholly redundant. Section 90(2) should be interpreted in such a manner as to avoid redundancy or duplication; so it must be interpreted to mean that the Tribunal is only authorised to take those steps for the trial of the petition which a Court has to take for the trial of a suit. The steps that a Court has to take in the trial of a suit are receiving the plaint, issuing notices to the defendant, receiving his written statement, examining the parties, framing issues, receiving plaintiff's evidence, receiving defendant's evidence, hearing arguments and delivering the judgment. Section 90(2) means that an election tribunal has to take the same steps at the hearing of the petition and nothing more. The Code of Civil Procedure makes a distinction between what is a step in the trial of a suit, i.e. what is included in the trial of a suit and what is not included in the trial of a suit. Even when a Court tries a suit it may also decide a case. For example, if while trying a suit it issues an injunction it amounts to deciding a case; it is not a step in the suit because it does not advance the termination of the suit in any way. There are numerous authorities dealing with section 115 which explain what proceedings taken under the Code itself amount to a case as distinct from the suit. It seems to us that

generally speaking all acts done or orders passed by a Court trying a suit which do not form part of the suit itself, but would amount to a case within the meaning of section 115, are outside the jurisdiction of an election tribunal. Section 116-A(2) of the Representation of the People Act lays down that a High Court hearing an appeal from an order made by an election tribunal "shall have the same powers, jurisdiction and authority, and follow the same procedure as if the appeal were an appeal from an original decree passed by a civil court", and sub-section (4) provides that if the appeal is from an order declaring the election of all or any of the returned candidates to be void it may stay its operation. Sub-section (2) makes a clear distinction between "powers, jurisdiction or authority" and "procedure", showing that "procedure" does not include "powers", "jurisdiction" and "authority". An injunction is a matter of power and not of procedure, because it does not at all affect the progress of the suit. A suit can go on or may remain stayed, whether an injunction is granted or refused. The granting or refusing an injunction is a matter distinct from the suit, and a Court has no jurisdiction to grant an injunction unless power is specially conferred upon it. It was a power of Equity Courts; ordinary Common Law Courts in England could not grant injunctions; vide 14 Halsbury's Laws of England, para 963. The provisions contained in section 90 were interpreted by the Supreme Court in *Harish Chandra* v. *Triloki Singh* (1). The question that arose before the Supreme Court was "when a trial commences". One party contended that it commences with the filing of documents and examining witnesses, while the other party contended that it commences with the receipt of the election petition transferred to the tribunal under section 86. What the Supreme Court held was that

(1) A.I.R. 1957 S.C. 444.

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"trial" includes the matters preliminary to the hearing of evidence, such as the receipt of written statement and settlement of issues. Another contention that was advanced before the Supreme Court was that the granting of an amendment is not a matter of "procedure" but a matter of "power", and that, since section 92 does not confer the power of allowing amendments upon the election tribunal, it has no power to allow an amendment. VANKATA RAMA AYYAR, J. did say at p. 454, dealing with the contention, that "we do not see any antithesis between 'procedure' in section 90(2) and 'powers' under section 92" but made it clear that an amendment is a procedural step and section 90(2) allows an election tribunal to amend pleadings. Allowing an amendment of pleadings may be a part of the trial of an election petition, but it does not follow that an order granting interim relief to the petitioner is a part of it. CHAGLA, C.J. observed in *Sitaram* v. *Yograj Singh* (1) that :

> "It is difficult to make a distinction between procedure and the powers of a Court as suggested by Mr. *Patwardhan*. The whole of the Civil Procedure Code as its very name implies, deals with procedure. In the course of procedure the Court always exercises powers and when the Court is exercising its powers it is exercising them in order to carry out the procedure laid down in the Code. Therefore procedure and powers in this sense are really interchangeable terms and it is difficult to draw a line between procedure and power. The power conferred under section 92 is not any substantive power, it is a procedural power, a power intended for the purposes of carrying out the procedure before the Tribunal."

There also the learned Chief Justice dealt with the power of an election tribunal to allow amendments

(1) A.I.R., 1958 Bom. 293, 295.

and held that the power was conferred by section 90(2). When the legislature itself distinguished between the power of trying a suit in accordance with certain provisions of the Code of Civil Procedure and the powers conferred by other provisions of it, it is difficut to agree with the above observations of the learned Chief Justice. The latest observation of the Supreme Court in *Mallappa Basappa* v. *Basavaraj Ayyappa* (1), leaves the matter in no doubt. BHAGWATI, J. said at page 704:

> "It is clear from the above that the section only provides for the procedure for the trial of election petitions by the Tribunals. It provides for the examination of witnesses, the rules of evidence to be followed, the joinder of candidates not already respondents as respondents and the amendment or amplification of particulars of a corrupt practice already alleged in the petition. The powers of a Tribunal are, however, separately dealt with in section 92. . . . . It will be noticed that the procedure for trial before the Tribunal and the powers of the Tribunal are treated separately thus distinguishing between the procedure to be followed by the Tribunal and the powers to be exercised by it. . . . The effect of all these provisions really is to constitute a self-contained Code *governing the trial* of election petitions and it would appear that in spite of section 90(1) of the Act, the provisions of O. 23, r. 1 of the Code of Civil Procedure would not be applicable to the trial of election petitions by the tribunals."

Since the language used in rule 25 of the Panchayat Raj Rules is exactly similar to that used in section 90 (2) of the Representation of the People Act it must be interpreted in the same manner. The two provisions are *pari matiria*. It is immaterial that there is no rule

(1) A I.R. 1958 S.C. 698

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corresponding to section 92 of the Representation of the People Act. Once a certain meaning is assigned to the words used in section 90(2), even though with the aid of section 92, the same meaning should be given to the words used in rule 25, even though the rules contain no provision corresponding to section 92.

Section 151 expressly speaks of "power" to make orders. Whatever may be said in respect of orders of a procedural nature, orders regarding matters not covered by the Code are not orders regarding procedure but are an exercise of power. Injunction is a relief according to sections 52 and 53 of the Specific Relief Act, and a relief is a matter of power, not procedure. We are, therefore, of the opinion that a sub-divisional officer hearing an election petition has not the powers conferred upon Civil Courts by sections 94 and 151 and Orders XXXIX and XLI of the Code of Civil Procedure.

Section 94, Civil Procedure Code, authorizes a Court to grant a temporary injunction, as provided in the rules, to prevent the ends of justice from being defeated. Rules 1 and 2 of Order XXXIX provide for the grant of temporary injunctions. Rule 1 admittedly does not apply. Sri *Gopi Nath* tried to make out that the interim relief sought from the sub-divisional officer was covered by rule 2 but ultimately had to concede that it also did not apply. For its applicability one condition was essential to be fulfilled and it was that there was a suit for restraining the defendant from committing a breach of contract or other injury of any kind. There was admittedly no question of a breach of contract being committed, but it was argued that the election petition is a suit for restraining opposite party no. 2, the candidate declared elected, from committing an injury to the appellant. Since an election petition is, vide rule 25, to be tried as if it were a suit, there

would be no difficulty in holding that it is a suit, within the meaning of Order XXXIX, Rule 2. In *Jagan Nath* v. *Jaswant Singh* (1) the Supreme Court applied even to an election petition under the Representation of the People Act the provisions of Order I, rules 9, 10 and 11, which are applicable to suits. The observations in *K. Kamaraja Nadar* v. *Kunju Thevar* (2) that an election petition is not an action at law or a suit in equity but is a purely statutory proceeding unknown to the common law, or that it is not a suit between two persons and is only a proceeding in which the constituent itself is the principal party interested, do not mean that even for the purpose of procedure at the trial of an election petition it is not to be treated as a suit notwithstanding the provisions of section 90(1) of the Representation of the People Act, or of rule 25 of the Panchayat Raj Rules. In *Mallappa Basappa* v. *Basavaraj Ayyappa* (3), it was held by the Supreme Court that an election tribunal cannot allow a petitioner to withdraw or abandon a part of his claim in exercise of the power alleged to have been conferred by Order XXIII, rule 1, but it was so held, as already pointed out, simply on the ground that the provision in Order XXIII, Rule 1, is not a provision relating to the trial of a suit and the special provisions contained in section 108, etc., render the power conferred by Order XXIII, rule 1, inapplicable. The real difficulty of Sri *Gopi Nath*, as was realised by himself later, was that the election petition was not aimed at restraining opposite party no. 2 from committing an injury. There was no question of his committing a breach of contract, but it was sought to be made out that opposite party no. 2 was not duly elected and that by claiming to be duly elected he was causing an injury to the appellant. The claim of the appellant that he is being

(1) A.I.R. 1954 S.C. 210. (2) A.I.R. 1958 S.C. 687, 693.
(3) A.I.R. 1958 S.C. 698.

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injured by the opposite party's claiming to be the duly elected pradhan is untenable. The word "elected" used in section 12K means "elected in fact" regardless of whether the election is valid or invalid, in other words, declared by the returning officer to be elected under rule 20I or 21Q. The words "elected" and "duly elected" are used by the draftsman in the Act and in the rules at random and the words "duly elected" used in the above-mentioned two rules mean nothing more than "elected". The election of any candidate can be held by an election tribunal to be invalid and any elected candidate may be unseated; therefore the use of the word "duly" means nothing. Whether an election is valid or not cannot be known until an election petition has been filed and determined; the question whether a person has been elected or not cannot remain in abeyance so long as an election petition has not been filed and it has not been decided whether his election was valid or not. It was certainly not the intention behind section 12K that a pradhan shall continue in office until the election of another person as pradhan in his place has been declared valid by an election tribunal. We have no hesitation in saying that as soon as a returning officer under either of the above-mentioned rules declares another person as elected as pradhan the previous or sitting pradhan ceases to hold office. It is not for the sitting pradhan to say that the election of his successor was invalid and no right has been given to him to remain in office so long as it has not been confirmed by an election tribunal that his election was valid. When an election tribunal upholds the election of the successor it means that the successor was already elected; the upholding of the election cannot itself amount to election. Otherwise it would mean that there is no election so long as an election petition is not filed and decided, which would be an

absurd situation, how can there be an election petition, if there is none elected? It is not of any consequence that section 12K does not use the words "declared elected"; there is no act other than that of declaring a person as elected which can amount to that of election and there is no date other than that on which the declaration is made, which can be said to be the date of his election. A person gets rights from the moment of his being declared as elected. There is a formality attached to the act of declaration of election, and it is because it has a legal value, which cannot be other than that it brings into existence the election of a pradhan. Rule 21R requires the returning officer to report the declaration to the District Magistrate and inform the secretary of the gaon-sabha. The limitation for filing an election petition runs from the date of the declaration. The constitution of a gaon-panchayat is dealt with in rule 19K; as soon as at least two-thirds of the seats of members and the office of the pradhan have been filled up the District Magistrate must notify that the gaon-panchayat has been duly constituted. This means two things, (1) that the notification by the District Magistrate itself amounts to constitution of the gaon-panchayat and (2) that for the constitution of a gaon-panchayat the mere fact of election of a pradhan is required and not that his election has been held to be valid in an election petition. As soon as practicable after the constitution of a gaon-panchayat its pradhan must take the oath of office, vide rule 86. In all these provisions it is the fact of election, evidenced by the declaration of election, that is considered and not the upholding of the election as valid by an election tribunal. The term of a pradhan commences on the date of the constitution of the gaon-panchayat; it thus commences even though the election of the pradhan has not been confirmed by an election tribunal and may even

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be in contest before it. If a pradhan commences to act as such on the date of the declaration of his election, he cannot contend that the term will not end with the declaration of election of his successor but will continue so long as his successor's election is not confirmed by an election tribunal. The Act does not contemplate that a pradhan's term should continue even after another gaon-panchayat has been constituted. The appellant's term expired long before he filed the election petition and he also ceased to hold the office on the date on which the opposite party no. 2, was declared elected. He has, therefore, absolutely no right left as pradhan and there is no question of his being injured by opposite party no. 2's claiming to be a pradhan. The election of opposite party no. 2 as pradhan may be invalid and his claim that he is pradhan may be untenable, but the appellant has no right whatsoever to remain in office as pradhan. Under rule 60A he is bound to hand over charge of the office to the new pradhan as soon as he takes the oath of office. If he wilfully neglects or makes a default in making over charge; it can be taken over through police help. The relief claimed by the appellant in the petition was that he may be declared as elected or the election of opposite party no. 2 be set aside and a vacancy in the office be declared. There was no relief claimed on the basis of his being the sitting pradhan, i.e. on the basis of his being elected as pradhan in 1955. It means that he did not complain of any injury to him in his capacity as sitting pradhan.

An election petition, though it is deemed to be a suit, cannot be said to be a suit for injunction; at the most it may be said to be a suit for declaration with consequential relief In *Gur Prasad* v. *Rameshwar Prasad* (1), a Bench of this Court granted temporary

(1) A.I.R. 1939 All. 944.

injunction in a suit for declaration that the plaintiffs were the directors of a company and not the defendants; it was not disputed in that case that temporary injunction could be granted. Consequently that case is no authority for the proposition that an election petition is a petition for injunction. *Muhammad Ekram Khan* v. *Mirza Muhammad Bakar* (1) also is no authority because the suit there was expressly for injunction. We hold that neither is the election petition a petition for injunction nor are the opposite parties alleged to be committing any injury to the appellant which they might be restrained from committing Reliance on Order XXXIX, rule 2, is, therefore, in vain.

Section 151, Civil Procedure Code, as is well known, does not confer any power upon a court but simply recognizes the existence in every court of the power to make such orders as may be necessary in the ends of justice or to prevent abuse of the process of court. This being the case, the appellant cannot contend that rule 25 confers upon an election tribunal the power of making such orders as may be necessary for these purposes. If section 151 does not confer this power upon a civil court, it certainly does not confer it upon an election tribunal. If an election tribunal can make orders for these purposes, it must be because it has the power just as any court has the power, i.e. because it has its own inherent power. We shall discuss this matter subsequently.

Coming to Order XLI, rule 5, Civil Procedure Code, we find that it does not apply in the present case because an election tribunal is not an appellate court, there is no decree to be reversed by it the execution of which may be suspended during the hearing before it and the rule does not relate to a trial of a suit. Further the essential condition for an order under Order XLI,

(1) A.I.R. 1935 All. 106.

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rule 5, that substantial loss may result to the party applying for stay of execution unless the order is made, is not fulfilled in the present case because, as already shown, the appellant has no right to be affected if opposite party no. 2 is not restrained from exercising his powers as pradhan.

In the result we find that even if the sub-divisional officer has all the powers that are conferred by the Code of Civil Procedure he could not grant the interim relief sought for.

Sri *Gopi Nath* next contended that the sub-divisional officer had the implied power to grant the interim relief; he said that the power was to be inferred from rule 25(3). The provision that he can declare a vacancy or declare the appellant to be duly elected in place of opposite party no. 2 does not mean that he can, before so declaring order opposite party no. 2 not to perform his duties as pradhan and direct the appellant to remain in office as pradhan. Such a reading of the provision of rule 25(3) would be against the various provisions already referred to, viz. the provisions that the appellant's term as pradhan expired with the term of the gaon-panchayat, that he could not remain in office after the election of opposite party no. 2, that opposite party no. 2 must take the oath of office at the place and time fixed for the purpose by the block development officer and that as soon as he takes the oath of office, the appellant must hand over charge of the office to him. It is not correct to say that rule 86 simply emphasizes the form of oath; it also imposes the obligation upon the newly elected pradhan to take the oath. If the block development officer fixes the place and the time for opposite party no. 2's taking the oath of office, the latter would be bound to do so. We do not think that in the absence of express provision the sub-divisional

officer had power to direct the block development officer not to fix the place and the time. It became the appellant's duty to hand over charge of the office to opposite party no. 2 on his taking the oath of office and it could not be assumed that the sub-divisional officer had the power to direct that the obligation imposed by rule 60A upon the appellant need not be discharged by him. To say that a certain provision of law need not be complied with would require an express provision of law. Under section 12E any member who refuses to take the oath of office shall be deemed to have vacated the office forthwith; this automatic effect of the failure to take the oath negatives the power in the sub-divisional officer to direct that opposite party no. 2 need not take the oath, i.e. that no adverse consequence will follow if he does not take it. Opposite party no 2 became pradhan since he was declared elected by the returning officer; he had to do no act after the declaration in order to become pradhan. After becoming pradhan he has only to perform his duties and he can be prevented, if at all, only from performing them. But that would not have the effect of enabling the appellant to perform them; whether opposite party no. 2 is allowed or not to perform them, the appellant cannot perform them at all.

If opposite party no. 2 could be prevented from performing his duties as pradhan and the appellant also could not perform them, it would mean that there will be nobody to perform the duties; such a situation is not contemplated by the Act or the Rules. The work of the gaon-panchayat cannot come to a standstill.

Sri *Gopi Nath* referred us to the statement in 31 H. L. E., paragraph 642, to the effect that an authority given by a statute to do certain work authorizes the doing not only of all things absolutely necessary for its execution but also of all things reasonably necessary,

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and also to *Matajag Dobey* v. *H. C. Bhari* (1), where CHANDRASEKHARA AIYAR, J. observed at page 936:

> "Where a power is conferred or duty imposed by statute or otherwise, and there is nothing said expressly inhibiting the exercise of the power or the performance of the duty by any limitations or restrictions, it is reasonable to hold that it carries with it a power of doing all such acts or employing such means as are reasonably necessary for such execution."

These are the powers in respect of execution of the orders already passed and not powers to be exercised in anticipation of passing of orders. The sub-divisional officer may have an implied power to do an act in order to implement the final order that he passes in the election petition, but it does not mean that he has an implied power to pass an order even before he finally decides. Implied power must be reasonably necessary and must not be derogatory to the other provisions of the statute. There is no necessity whatsoever of implying any power in the sub-divisional officer to prevent the transfer of the charge from the appellant to opposite party no 2. The appellant, as explained earlier, has absolutely no right which needed protection during the pendency of the writ petition. If the election petition succeeds, whether he is declared elected or a vacancy is declared, there will be no difficulty in implementing the order. If the appellant is declared elected he can take back charge of the office from opposite party no 2 and if a vacancy is declared, an election will take place and whoever is declared elected will take charge of the office from opposite party no. 2. There is no necessity of preventing opposite party no. 2 from performing his duties during the pendency of the election petition: they must be performed and they cannot be

(1) (1955) 2 S.C.R. 924

performed by anybody except him. We, therefore, reject the claim of Sri *Gopi Nath* that the sub-divisional officer has implied power to grant the interim relief.

Sri *Gopi Nath's* last resort was to the inherent powers. The inherent powers are of a court and we do not accept that an election tribunal is a court. Merely because it records evidence, hears parties and decides certain disputes between them it does not become a court, which is invested with the power of making any order that it considers necessary in the interest of justice or to prevent abuse of the process of court. Courts derived authority from the Crown, but election tribunals do not and there is no question of their doing justice regardless of rules of procedure. They are created by the statute to decide certain disputes and are bound to decide them strictly according to law after following the prescribed procedure and have jurisdiction to do only what they are expressly empowered to do. Only those courts which have the general jurisdiction to do justice are competent to pass any orders that they consider necessary in the interest of justice, even though they are not covered by express provisions of the laws of procedure. We have already referred to *K. Kamaraja Nadar* v. *Kunju Thevar* (1) and *Mallappa Bassappa* v. *Basavaraj Ayyappa*, (2) which explain the nature of election tribunals. In the former case it was observed that an election tribunal possess no common law power. In *Hurro Chunder Roy Chowdhry* v. *Shoorodhonee Debia* (3), PEACOCK, C. J. observed that "it is the duty of the Judges to apply the laws not only to what appears to be regulated by their express dispositions, but to all the cases to which a just application of them may be made, and which appears to be comprehended either within the express senses of the law, or within the consequences that may be gathered from it". MAHMOOD,

(1) A.I.R. 1958 S.C. 687. (2) A.I.R. 1958 S.C. 698.
(3) 9 W.R. 402,406.

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J. observed in *Narsingh Das* v. *Mangal Dubey*, (1) with reference to the Civil Procedure Code that the Courts are not to act upon the principle that every procedure is to be taken as prohibited unless it is expressly provided for by the Code; but on the converse principle that every procedure is to be understood as permissible till it is shown to be prohibited by the law. The same view was taken in *Md. Sulaiman Khan* v. *Md. Yar Khan* (2). We do not think any of these authorities helps the appellant at all. Even if the sub-divisional officer is a court charged with the duty of seeing that justice is done, he has only to see that justice is being done. The granting of the interim relief is not essential for doing justice to the appellant; it is not justice to give him a relief to which he is not entitled or to prevent another person from exercising his right merely because it is challenged. As was pointed out by one of us in *U. P.* v. *Mukhtar Singh* (3), it is not just to stay execution of an order merely because it is appealed from and that justice lies in allowing it to be executed so long as it is not set aside. It would be an act of injustice to treat opposite party no. 2 as not elected even though he has been declared elected and it would further be an act of injustice to let the appellant, whose term has expired and who is left with no right on account of his election as pradhan in 1955 and who was defeated in the next election, function as pradhan. There would be absolutely no difficulty in giving effect to whatever order is passed by the sub-divisional officer in the election petition. There is absolutely no question of preventing abuse of the process of court. The appellant does not challenge the termination of his office as pradhan; what he challenges is the election of opposite party no. 2. The interim relief has no connection with the re-

(1) (1882) I.L.R. 5 All. 169, 172. (2) (1888) I.L.R. 11 All. 287, 287.
(3) A.I.R. 1957 All. 505.

lief sought in the election petition and even a court has no inherent power to grant an interim relief not connected with the relief sought in the suit. The appellant's status in the election petition is either that of a defeated candidate or that of an elector but not that of an ex-pradhan. Therefore no interim relief can be granted to him as ex-pradhan. It is not correct that he seeks in the election petition the removal of a cloud on his right; he has no right whatsoever until the sub-divisional officer declares him elected. Even if the election of opposite party no. 2 is invalid or void, no vacancy arises so long as it is not declared void by the sub-divisional officer. There is therefore, no vacancy at present. The charge of office must be taken from the appellant even though there may be no duly elected pradhan; it can be taken by the up-pradhan or by a panchayat inspector. The absence of a duly elected pradhan would be no justification for not taking over charge from the appellant.

In *Venkatasubbiah* v. *Sesha Aiyar* (1), it was held that an election tribunal has no inherent powers.

We are not impressed with the argument advanced in a connected petition by Sri *C. S. P. Singh*, that if the newly elected pradhan is allowed to take charge, the sitting pradhan, who challenges his election, may be handicapped in producing evidence before the tribunal: the argument is that the newly elected pradhan, who is charged by rule 47 (*e*) with the maintenance of various registers, may destroy the evidence and the sub-divisional officer would be powerless to do justice. The argument cuts both ways, and moreover there is no such plea taken in any of the petitions for interim relief.

We, therefore, hold that the sub-divisional officer had no inherent power also to grant the interim relief.

(1) A.I.R. 1924 Mad. 797.

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In the end we may point out that an election is not a matter to be lightly interfered with; see *Jagan Nath* v. *Jaswant Singh* (1). These petitions are directed against interlocutory orders and as was pointed out by this Court in *Mubarak Mazdoor* v. *K. K. Banerji* (2) the High Court does not issue a writ in an interlocutory matter though there is no absolute bar. There is nothing extraordinary in this case justifying our departure from the normal rule.

Some of the companion petitions are against orders of sub-divisional officers, like the present one, and others are against orders of Munsifs. Some of the petitioners filed regular suits for injunction in the courts of Munsils and the Munsifs refused injunctions on the ground that the suits were barred; Petitions nos. 61, 93, 107 and 129 are filed against those orders In Civil Miscellaneous Case no. 106 of 1961 it was held by our brother MATHUR that no petition lies against an order of a Munsif refusing injunction because alternative remedy of appeal is available. We respectfully agree with him.

Some of the connected petitions are by electors, but what we have said above holds good in them also An elector has no right which would require protection through the interim relief claimed.

In petition no. 171 of 1961 the sub-divisional officer held that he had the power to grant the interim relief but refused it on merits. His order cannot be quashed under Article 227.

In petition no. 248 of 1961 also the sub-divisional officer refused the interim relief on merits and this Court has no jurisdiction to quash his order under Article 227.

Thus the present petition and the connected petitions deserve to be dismissed.

Petitions dismissed.

(1) A.I.R. 1954 S.C. 210. (2) 1957 A.L.J. 930.

(FULL BENCH) APPELLATE CIVIL

Before the Honourable M. C. Desai, Chief Justice Mr. Justice Mukerji and Mr. Justice Dwivedi

BUDDHAN SINGH AND ANOTHER (DEFENDANTS)

v.

NABI BUX AND ANOTHER (PLAINTIFFS)

1961

May, 24

United Provinces Tenancy Act *and Uttar Pradesh Zamindari Abolition and Land Reforms Act,* 1952, *s.* 9—*Zamindar entering possession over site and constructions in abadi when tenant absent temporarily from village—On return tenant obtains decree for possession—Before possession is restored U. P. Zamindari Abolition and Land Reforms Act comes into force—With whom is the State Government to settle land under s.* 9 *of the Act—The term "belonging to or held by" in s.* 9 *explained—Whether possession must have legal origin.*

A is the tenant of *B* who is the zamindar. *A* has some constructions over the site of which he is the lessee. Because of certain disturbances *A* left the village and *B* entered possession over the site, included it in his own compound and demolished the constructions. *B* made certain constructions of his own in the site in suit. On a suit by *A* against *B* for possession over the site the trial court came to the conclusion that *A* had left the village only temporarily with the intention of returning to the village and *B* had no right to enter into possession. The suit was decreed for possession over the site. *B* appealed and during the pendency of the appeal the Uttar Pradesh Zamindari Abolition and Land Reforms Act came into force. *B*, however, did not base his case on any provisions of the Act. On merits of the case the Judge dismissed the appeal and the decree in favour of *A* was confirmed.

In Second Appeal filed by *B* the contention is that on 1st July, 1952, when the Uttar Pradesh Zamindari Abolition and Land Reforms Act came into force *B* and not *A* was in possession of the constructions as well as of the site in suit and in view of s. 9 of the Act the lower appellate court could not give a decree in favour of *A*.

(*Per* MUKERJI and DWIVEDI, JJ., DESAI, C. J. dissenting)—

Under s. 9, the word 'hold' did not connote a title of a trespasser, but that it referred to a title that had a legal origin. A person who trespassed on the land of another and contructed a building on that land of the other, did not by that

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trespass, unless the right of the owner was barred by the law of limitation, acquire under the provisions of s. 9 of the Uttar Pradesh Zamindari Abolition and Land Reforms Act, any title, right or interest to continue the building on that land or to have acquired any interest in that land.

It does not refer to a person, who has encroached upon the land of some person and erected a building over there or has taken possession over the building and the site thereof by ejecting forcibly a rightful claimant.

Phenku Ghimar v. *Harish Chandra* (1) affirmed; *Bharat* v. *Khazan Singh* (2) dissented from.

(Per DESAI, C. J.)—Though the suit of *A* was decreed, it was in appeal, and, since s. 9 of the Uttar Pradesh Zamindari Abolition and Land Reforms Act came into force on 1st July, 1952 the appellate court was bound to consider its provisions before deciding the appeal It had not merely to see whether the decree passed by the lower court was correct or not; it had to deal with the matter as if it were itself trying the suit. When the only constructions that stood on the site belonged to, and were in the occupation of *B* only *B* could continue to own and be in occupation of them. *A* who was not the owner and was not even in possession of them could not possibly be said to continue to own them after 1st July, 1952.

Even if, the word 'held' is used to mean 'held under a title' or 'held lawfully' the respondents could not get the benefit of s. 9 because as explained above, the only building that stood on 1st July, 1952, was the cattle shed belonging to the appellant and in their own physical possession, and since no building belonging to the respondent stood on that date, no land could be deemed to be settled with them. On 1st July, 1952 they lost their right as licensees.

Second Appeal no. 1302 of 1952, from a decree of G. C. Agarwal, First Temporary Civil and Sessions Judge, Meerut, dated the 17th July, 1952, in Civil Appeal no. 107 of 1952.

The facts appear in the judgment.

S. B. L. Gaur, for the appellants.

N. S. Singhal, for the respondents.

MUKERJI, J.:—This is an appeal by two defendants against a decision of the 1st Temporary Civil and Sessions Judge, Meerut, decreeing the plaintiffs' suit. The plaintiffs filed a suit on the allegations that they

(1) 1953 A.L.J. 197. (2) 1957 A.L.J. 743.

were *riayas* in village Nagli Abdullah a hamlet of village Machhra, that the site of the house had been taken by their father from the defendants' ancestor about 60 years ago and that thereafter the plaintiffs made a few *kothas* on the site for their residential purposes. The plaintiffs further alleged that during the communal disturbances of 1946 and 1947, they left the village temporarily for the purposes of security and lived with their relations in another village, that when conditions improved and security was restored in Nagli Abdullah they returned to it but found that their house had been unlawfully taken over by the defendants and not only that the defendants had demolished the plaintiffs' construction but they had also included the land in their own house.

The defence that was taken to the suit was that the site in dispute had been given to Husaini some 13 years ago on rent which was received in kind and that Husaini had subsequently abandoned his tenancy and therefore the site reverted to the appellants as Zamindar and that they had taken possession of the site as such.

The trial court held that the site had been included in the residential house of the defendants and that the defendants had not abandoned the same by leaving the village. The lower appellate court also held that the land in suit had the residential structures of the plaintiffs on it. The lower appellate court accepted the case of the plaintiffs to the effect that they were *riayas* and they possessed the site as such and that they had on the site their residential *kothas*. From the decision of the lower appellate court, it is clear that the constructions which originally stood on that site were not only *kachcha* constructions, but they were in a dilapidated condition. The lower appellate court affirmed the findings of the trial court to the effect that the plaintiffs did not abandon the site and that they did not abandon

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the village, for it found that they left the village with the intention of returning back to it.

The appellate court affirmed the decision of the trial Court and dismissed the appeal, which meant that the plaintiffs had a decree in their favour for actual possession of the property detailed at the foot of the plaint.

In this second appeal, it was contended that on the findings arrived at by the courts below, the plaintiffs' suit could not be decreed because of the provisions of section 9 of the U. P. Zamindari Abolition and Land Reforms Act, 1950. Before turning to consider the effect of section 9 on this case, it would be useful to reiterate the main findings on which the argument in respect of section 9 was founded. The findings which need reiteration are:

(1) That the site was held by the plaintiffs at one stage as *riayas* and that on that site stood certain *kachcha* constructions which were not in very good repair at the time when the plaintiffs temporarily left the village.

(2) That the plaintiffs did not abandon the village but they only, temporarily, left the village with the idea of coming back to it when conditions in the village became settled and safe for them.

(3) That during the absence of the plaintiffs from the village, the defendants who were intermediaries—having been formerly Zamindars—took possession of the constructions that stood on the site and the site as well and that after having taken possession thereof they demolished the dilapidated kuchcha constructions and included the site in their own residential house.

Section 9 is in these words:

"All wells trees in abadi, and all buildings situate within the limits of an estate, belonging to or held by an intermediary or tenant or other person

whether residing in the village or not, shall continue to belong to or be held by such intermediary, tenant or person, as the case may be, and the site of the wells or the buildings with the area appurtenent thereto shall be deemed to be settled with him by the State Government on such terms and conditions as may be prescribed."

On behalf of the appellants it was contended that the site in respect of which there was a dispute was, at any rate, an area appurtenant to the buildings both "belonging to" and "held" by the defendants. On behalf of the respondents, it was contended in reply that the land in dispute could not be said to "belong to" or to be held" by the defendants because the land had been taken by the plaintiffs lawfully from the zamindars and that the plaintiffs had raised certain constructions on that land and that the plaintiffs never abandoned either the constructions or the land which could give the intermediary defendants the right to appropriate the land and the constructions thereon for their own benefit lawfully or to include the same in their own property. The solution to the controversy raised would depend upon whether the words "belonging to" in section 9 and the word "held" in that section require that there should be a lawful basis for claiming the property or for holding the property, that is to say, whether section 9 requires a legal basis for the two situations which are visualised under that section in respect of buildings and the site on which such buildings stood

There has been a difference of opinion in this Court in regard to the true meaning of section 9, and that was the reason why this case was referred to a Full Bench. In *Pheku Chamar* v. *Harish Chandra* (1), AGARWALA and CHATURVEDI, JJ. held that section 9 of the U. P. Zamindari Abolition and Land Reforms Act did not confer any right on persons having no title to

(1) 1953 A. L. J. 197.

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a piece of land and that it was confined to its application to a case where the building on the disputed land was lawfully held by the person in possession. They further expressed the view that the word "held" in section 9 referred to the existence of such possession as could be traced to a lawful origin. In *Bhanat* v. *Ch. Khazan Singh* (1), DESAI and TAKRU, JJ. held that there was nothing in the language of section 9 of the U. P. Zamindari Abolition and Land Reforms Act which could suggest that the site of a building could be settled with an intermediary, tenant or other person only if any of them was a lawful owner of it or held it lawfully. These learned Judges were of the opinion that the language used by the Legislature in section 9 was so wide as to include the claim of a trespasser also, for the learned Judges expressed the view that in case a trespasser constructed a building on a site then the building and the site would be deemed to be settled with the trespasser and not with the owner of the site; they held that the building would be deemed to be settled with an intermediary only if the building belonged to him and not otherwise.

The word "held" has not been defined in the Act, nor do we find any definition of the word in any of the Acts which could be said to be *in pari materia* to assist in determining the meaning of this word with any amount of certainty, so that we have to revert to the dictionaries for its meaning.

Webster's New Twentieth Century Dictionary (Second Edition) giving the meaning of the word "held" has this to say:

> "in law, (*a*) to decide; adjudge; decree;
>
> (*b*) to bind by contract;
>
> (*c*) to possess by legal title; as,
>
> "who holds the mortgage?"

(1) 1957 A.L.J. 743.

Bouvier's Law Dictionary (Baldwin's Century Edition) says this:

"HOLD. A technical word in a deed introducing with 'to have' the clause which expresses the tenure by which the grantee is to have the land. The clause which commences with these words is called the *tenendum*. (Tenendum was that part of a deed which was formerly used in expressing the tenure by which the estate granted was held; but since all freehold tenures were converted into socage, the *tenendum* is of no further use even in England, and is therefore, joined to the *habendum* in this manner,—to have and to hold. The words 'to hold' have now no meaning in our deeds. According to Bouvier, it may be pointed out that *habendum* is that clause which usually following the granting part of the premises of a deed, which defines the extent of the ownership in the thing granted to be held and enjoyed by grantee. The equivalent words of '*habendum et tenendum*' are 'to have and to hold')"

Bouvier further says this:

"to decide, to adjudge, to decree: as the court in that case *held* that the husband was not liable for the contract of the wife made without his express or implied authority;

to bind under a contract: as the obliger is held and firmly bound. . . . . ."

Stroud's Judicial Dictionary Volume 2(1952, Third Edition), page 1328 says thus:

"There is a material difference between a holding and an occupation. A person may hold, though he does not occupy. A tenant is a person who holds of another: he does not necessarily occupy."

In some old English cases while interpreting the provisions of Statute 59 G. 3. c. 50, it was pointed out

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that under that Act a building was "held" and land was "occupied".

In *the King against the Inhabitants of Stow Bardolph* (1) a distinction seems to have been drawn between holding and possessing, but that was in respect of the Statute mentioned above. In *Williams v. Phillips* (2) while considering the question as to the nature of right that a plaintiff was entitled to under the words of the Statute 8 and 9 Vict. c. 118, Lord Justice COTTON said:

> "The plaintiffs claim to be entitled to the allotments under the words of the statute and under the words of the lease. We must first ascertain what the facts are, and then see how the words of the lease are to be construed. Up to the year 1857 certain rights of common attached to Werfa Farm existed over a common called Hirwain Common. In 1859, by an order made under the Inclosure Act, the rights of common were extinguished but the right to an allotment was created instead of it. I need not read the words of the lease. After the order had been made no right of common attached to the farm existed over the land to be inclosed; but in substitution for the right of common a right to an allotment was created, which was given to the owner of the farm. I do not think that the words of the lease comprise the right to the allotments. It was not a right "belonging" to the farm; it was not 'usually held or enjoyed' with the farm. Possibly by apt words the allotments might have been included in the demise; but they do not exist here, and it would be a little strange if a lease at a fixed rent were to include the right to allotments, which might not be finally set out for an indefinite number of years. . . . ."

(1) Barnewall and Adolphus Reports, Vol. I, p. 270.

(2) L.R. [1881] 8 Q.B.D. 437.

As I pointed out earlier, the word 'hold' or "held" had not been defined anywhere and that we had to rely on the dictionary meaning of the word, and if necessary modify that meaning or add to that meaning according to any judicial interpretation that may have been given to these words.

Webster's New Twentieth Century Dictionary Judicial Dictionary, Vol. 2 (Third Edition) at page "held" means to possess by legal title. Stroud in his judicial Dictionary, Vol. 2 (Third Edition) at page 1328 (I have already quoted this earlier) says that there was a material difference between "holding" and "occupation". If there was a material difference then 'held' could only appropriately refer to the title which entitled the person to occupy, for as pointed out by Stroud, a person may "hold" and yet may not "occupy."

The observations of Lord Justice COTTON in the case, *Williams* (1), quoted by me earlier, also indicated that the words "belonging to" and "held" did refer to a legal origin.

In *Pheku Chamar's case* (2) when a Bench of this Court said that they found it difficult to understand why the Legislature should have preferred a trespasser over a rightful owner, they in effect expressed the view that the word "held" connoted the existence of a right or title in the holder and so did the words "belonging to". Nothing can properly belong to a person who does not own the thing whether it be land, building or chattel, though it is in a certain sense possible for a person to hold a thing in the sense of having possession of the thing even though he was not the owner thereof. Nevertheless, it could not be said that the word 'hold' or 'held' could not or should not refer to a lawful holding.

It is well recognised that if a word is capable of being understood in a narrow as also a broad sense then one

(1) L.R. [1881] 8 Q.B.D. 487. (2) 1953 A.L.J. 197.

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has to look to the setting in which the word appears in order to ascertain the sense in which the Legislature used the word. In the Zamindari Abolition and Land Reforms Act, other words which could in the popular sense be synonyms of the word 'hold' or 'held' have been used. For example, in section 13, it is said that a thekadar of an estate or share therein shall, with effect from the date of vesting, cease to have any right to hold or possess, as such, any land in such estate. The question naturally arises as to why the two words 'hold' or possess' have been used in juxtaposition. In section 16, which deals with the rights of occupation of land, the word 'occupant' has been used. If the intention of the Legislature was to use the word 'hold' in a general sense, then they should have used the words 'holder of land' in the section. In section 17, the word 'held' has definitely been used in the sense of possessing the land under some title. The words of section 18, in my opinion, provide some clue to the meaning which the Legislature wanted to give to the word 'hold' in the Act, for section 18 says this:

> "Subject to the provisions of sections 10, 15, 16 and 17 all lands—
>
> (*a*) in possession of or held or deemed to be held by an intermediary as *sir*, *khudkasht* or an intermediary's grove,
>
> (*b*) held as a grove by, or in the personal cultivation of a permanent lessee in Avadh,
>
> (*c*) held by a fixed-rate tenant or a rent-free grantee as such, or
>
> (*d*) held as such by—
>
> (i) an occupancy tenant,
> (ii) a hereditary tenant,
> (iii) a tenant on Patta Dawami or Istamrari referred to in section 17,
>
> } possessing the right to transfer the holding by sale.
>
> (*e*) held by a grove-holder,

on the date immediately preceding the date of vesting shall be deemed to be settled by the State Government with such intermediary. . . .".

Section 19 also used the word "held" and also "deemed to have been held". It cannot be said that the word "held" in the section could apply to a trespasser.

Section 20 contemplates rights in respect of land arising out of two clear cut situations: (1) where the right may arise out of legal origin, and (2) where the right may arise in favour of a trespasser merely by his being an occupant of the land. To my mind the use of the word 'occupant' in sub-section (*b*) of section 20 clearly indicates that the Legislature when it used the word "held" did not intend to give the word a meaning that could embrace in its ambit a trespasser.

In the case of *Bharat* (1), the position was as pointed out in the decision itself, at page 744 column 2 that the defendant intermediary had admittedly lost actual possession in July, 1945 and that on the date of vesting, he had neither any title nor was he in possession, nor had he any right to possess the land. Under the circumstances the question which we have to determine, namely, whether the word "held" in section 9 related to legal origin or not did not specifically arise for determination. The learned Judges in *Bharat's* case further pointed out that the respondent of that appeal could not show any title better than the appellants after they had remained in peaceful possession for a year or more. The learned Judges further observed thus:

> "There is no dispute about the ownership; the respondent himself does not claim that it belongs to him. Since the building is situated within the limits of an estate, under section 9 of its site (together with the area appurtenant thereto) must be deemed to be settled with the appellants by the State

(1) 1957 A.L.J. 743

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Government. The appellants now are in lawful possession of the site of the building on account of the settlement and are not liable to ejectment. They might have been liable to be ejected as trespassers before the vesting but in consequence of the vesting, their possession on the site is to be deemed as the result of the settlement with the State Government in whom the land vests."

The learned Judge in *Bharat Singh's case* (1) differed from the view expressed in *Pheku Chamar's case* (2) as it appears to me, mainly, on the ground that they thought that by giving the meaning which the Bench had given to the word 'held' the Bench had in effect imported the word 'lawful' into the section. With great respect to the learned Judges, I do not think that in *Pheku Chamar's case* (2) any such attempt had been made by the learned Judges.

In this connection, it may be useful to advert to what has been said by Mr. Justice FRANKFURTER in *United States of America* v. *William S. Mumia* (3). FRANKFURTER, J., clearly pointed out that one could not always shut one's eyes to everything else except the naked words of an Act. The learned Judges warned against the pernicious effects likely to follow over-simplification in interpretations. As FRANKFURTER, J. pointed out "a statute, like other living organisims, derives significance and sustenance from its environments from which it cannot be served without being mutilated." In my view it would be mutilation of the meaning and the intent of the Legislature to give meaning to the word "held" and the words "belonging to" in section 9 of the U. P. Zamindari Abolition and Land Reforms Act as was given in the *Bharat's case* (1). It should not be forgotten that a man can unlawfully occupy or even

(1) 1957 A.L.J. 745. (2) 1959 A.L.J. 197.
(3) 87 L. Ed. 379, 382.

possess something, but strictly speaking, in legal parlance, at any rate, he cannot unlawfully hold anything the same applies to the expression "belonging to".

It is well recognized that, even though, what was called "the doctrine of equitable construction" is no more relied upon by Courts, even so, it is perfectly clear that even now it is well entrenched in law that giving a liberal or a strict construction to sections must be in accordance with certain principles: it is further well recognized that in interpreting a legislative enactment, Courts presume, without doubt, that a legislature performs its functions properly and that the legislature has "as its ultimate intent the enactment of laws founded on recognized concepts of justice, commonsense and reason all of which operate to control the legislature in performance of its law-making function" (1). It is well recognized that civilized society is founded upon certain standards of ethical conduct, and that in a democracy, laws must harmonize with the general aims and standards of the people. It has been pointed out by Crawford in his book on Statutory Construction at page 299 that—

> "It must be assumed that the law-makers who represent the people, enact all laws in the light of what the people believe is honest, fair and equitable and in harmony with the public welfare. In other words, the entire legislative process is influenced by considerations of justice and reason. Justice and reason constitute the great general legislative intent in every piece of legislation. Consequently, where the statute or a suggested construction operates harshly, ridiculously, or in any other manner contrary to prevailing conceptions of justice and reason, in most instance, it would seem that the apparent or suggested meaning of the statute, was not the one intended by the law-makers. In the absence of some other indications that the

(1) *See* Statutory Construction by Crawford, page 298.

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harsh or ridiculous effect was actually intended by the legislature, in addition to the apparent or suggested meaning, there is little reason to believe that it represents the legislative intent."

In my view placing the interpretation that was put on the word "held" and on the phrase "belonging to" in section 9 of the U. P. Zamindari Abolition and Land Reforms Act as put in the case of *Bharat* (1) would be to defeat the real intent of the legislature in enacting section 9. As I have pointed out earlier the legislature, where it wanted to confer a right on a mere occupant it said so in unmistakable terms as in section 20 (*b*). It could not in my opinion be argued that the legislature by enacting the U. P. Zamindari Abolition and Land Reforms Act of 1950 intended to confer rights on persons who had no rights at all. This piece of legislation was based on certain well-recognized modern conceptions of rights in property and rights to hold the property. It was argued that section 20(*b*) clearly indicated that the legislature wanted to confer rights on rank trespassers. I do not think that the legislature really wished to confer any rights on rank trespassers. What the legislature intended to do was to recognize the right of a person who had been recorded as an occupant in a certain *fasli* year, *i.e.* to say 1356 *fasli*. The legislature presumed, and in my opinion it could legitimately do so, that a person when he was recorded in the revenue records then it could be assumed that he was so recorded because he had some title to the land in respect of which he had been recorded as occupant; so that the legislature by enacting section 20(*b*) could not be said to have really accepted the principle that even unlawful possession could equate legal title.

From what I have said earlier, I feel no difficulty in coming to the conclusion that under section 9, the word

(1) 1957 A.L.J. 748.

'hold' did not connote a title of a trespasser, but that it referred to a title that had a legal origin. A person who trespassed on the land of another and constructed a building on that land of the other, did not by that trespass, unless the right of the owner was barred by the law of limitation, acquire under the provisions of section 9 of the U. P. Zamindari Abolition and Land Reforms Act any title, right or interest to continue the building on that land, or to have acquired any interest in that land. In my opinion, therefore, this appeal which is by the defendants must be dismissed.

DWIVEDI, J.:—I agree with the opinion of MUKERJI, J., who has been good enough to send me an advance copy of his judgment. In view of the importance of the question raised in this case, I would however prefer to state shortly my own reasons for our view.

The facts of the case have already been stated fully in the judgment of MUKERJI, J. The appeal comes to us for resolving the conflict between the decisions of two Division Benches of this Court in *Phaku Chamar* v. *Havish Chandra* (1) and *Bharat* v. *Ch. Khazan Singh* (2) In the former case it was decided that the word 'held' in section 9 of the U. P. Zamindari Abolition and Land Reforms Act, 1951 (hereinafter called the Act) connotes the existence of a right or title in the holder; in the latter case it was held that that word was also apt to refer to a person, who has encroached upon the land of another person and has erected a building over the land.

In the latter case the trespasser has encroached upon a piece of land in the *abadi* long before the commencement of the Act. The zamindar instituted a suit for his eviction from the site after demolition of the building. His claim was founded solely on his zamindari right. The suit was decreed, and on appeal the learned Judges held in essence that the trespasser could not be

(1) 1953 A.L.J. 197. (2) 1957 A.L.J. 743

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ejected at the instance of the zamindar who had no subsisting interest in the site of the building after the commencement of the Act. It may be observed that in that case the learned Judges were not directly called upon to decide whether the trespasser was liable to be ejected at the suit of the Government or the Gaon Sabha. They supported their opinion by a similar view already expressed in *Syed Mohammad Raza* v. *Ram Lal* (1). There, however, KIDWAI and H. S. CHATURVEDI, JJ., expressly reserved their opinion about whether the Gaon Sabha would have any right to eject the trespasser.

With these preliminary remarks I would quote from Shorter Oxford Dictionary the meaning of the word "hold":

> "To own as property, to be in possession, or enjoyment of, to have or keep as one's own, to retain possession or occupation of."

Webster's Dictionary defines the word thus:

> "To retain in one's keeping, to maintain possession of or authority over, to retain by force, to own or possess, to occupy, to derive title to."

It is apparent that according to its Dictionary meanings the word 'held' not only connotes the existence of a right or title but also denotes a wrongful possession. Now, there is little doubt that when a word has only one meaning, it must be given that meaning. It is, however, a well-recognized rule of statutory construction that, if a word is susceptible of a narrower as well as a broader meaning, we must look to the setting and vision of the Act in order to ascertain in what sense the Legislature has used the word in that setting and vision. Another well known rule of interpretation, which also lays stress on the context, is *'noscunter a sociis'*. When two or more words, which are susceptible of analogous meaning, are coupled together, they are understood to be used in their cognate sense. They take their colour

(1) 1955 A.L.J. 496.

from each other, and the more general is restricted to a sense analogous to the less general. In *M. K. Ranganathan* v. *Government of Madras* (1), apparently general words were given a narrower meaning in the light of their immediate collocation.

Coming back, therefore, to section 9 of the Act we notice that the word 'held' is the proximate associate of the expression 'belonging to' This expression connotes a lawful right or title and excludes a wrongful possessory claim. The word 'held' should therefore be construed in a cognate sense, and so construed it would also connote the existence of a lawful right or title.

Again, we have also to look to the expression 'by an intermediary or tenant or other person, which follows immediately after the word 'held'. In the context of intermediary and tenant when the words 'other person' are read *ejusdem generis*, as they should be, they would also refer to lawful title-holder and not to a wrongful occupant.

Let us now examine the remote context of the word in the body of the Act itself. In section 2(1) (*c*) of the Act the word 'held' is definitely used in the limited sense of a lawful right. In sections 13, 17, 18, 21, 144, 204, 240A, 290, 298, 304 and 314, it is used in the context of lawful title-holders. It may also be observed that, whenever the legislature intended to bestow a legal right on a wrongdoer, it has said so in plain and unambiguous language, for instance, in sections 16, 20, 21(2), 210 and 228.

It would be presumed that the Legislature was aware that the word 'held has been used to connote a lawful title in some of the earlier tenancy laws, for instance, in section 7 and clause (*c*) of the first proviso to section 8 of the N. W. P. Rent Act, 1881 and section 3(10) of the U. P. Tenancy Act.

(1) (1955) 2 S.C.R. 374.

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At this stage we may also notice some precedents, which support our view In *Harjas* v. *Radha Kishan* (1), the phrase 'land held by him as *sir*' in section 7 of the N. W. P. Rent Act, 1881 came up for interpretation by this Court. The defendant in the case had sold his one-third share in *sir*-land to the plaintiff, who was already in possession over the land as a mortgagee. The plaintiff claimed that the defendant did not become an expropriatory tenant under section 7, for the land was not at the time of sale "held by him as *sir*". Repelling this contention STRAIGHT, officiating, C.J. said that—

> "the words 'land held by him as *sir*" must be constructed to mean land belonging to him, or to which he was entitled, as *sir*,"

In *Rex against the Inhabitants of North Collingham* (2), it was said that 'hold' was used in contradistinction with 'occupy' to connote the sense of 'held' under law'. In *the King against the Inhabitants of Tonbridge* (3), this view was adopted In *Smallwood* v. *Sheppards* (4), it was said that 'held' was different from 'enjoyed' and that a person could hold as tenant though he was not occupying the premises

The object underlying section 9 is to be seen in the light thrown by the preamble and section 6 of the Act on the backcloth of the antecedent law with respect to buildings in villages. Before the advent of the Act the zamindar was the absolute proprietor of every inch of soil within his zamindari, and no body could build houses or other structures without his leave. Any person erecting a building without his permission stood in the position of a trespasser. The zamindar, however, used to grant licences to his *raiyat* generally to build their houses, etc. over his land. Even in regard to these licences a transferee of a building from a *riyaya* without the permission of the zamindar stood in the position of

(1) (1886) I.L.R. 8 All. 256.
(2) 6 B. & C. 88.
(3) 2 B. & C. 578
(4) (1895) 2 Q B. 627.

a trespasser *qua* the zamindar, who could eject him at will. The preamble of the Act indicates that one of the objects of the Act is to transfer the right, title and interest of the zamindar in his zamindari to the State. On such transfer the State becomes the sole proprietor of all land within the zamindari, and it would according to general law be entitled to eject the trespasser, who has erected or purchased any building within the zamindari area without leave of the *quondam* zamindar. Coming now to clause (*b*) of section 6 of the Act we notice that the licence granted by the *quondam* zamindar in favour of a *riyaya* to erect a building on his land is determined by operation of law. Consequently on the vesting of the zamindari in the State of *riyaya* also became a trespasser *qua* the State with respect to the site of the building. The Legislature was thus called upon to define the nature or relationship between the State on the one hand and the rank trespasser or the former licensee-trespasser. The purpose of section 9 is, I think, to define this relationship. There is no dispute here that the Legislature intends to maintain the *status quo qua* the former licensee-trespasser. He would now hold the site of the building from the State. It is however maintained that the general language of section 9 also evidences a legislative intention to recognize the claims of a rank trespasser. I see nothing plain and precise in section 9 its marginal note, which would make manifest a legislative intent of clothing the rank trespasser with the garb of law. The marginal note cannot, however, be referred to for any purpose in connection with the construction of section 9 [see *Balraj Kuer* v. *Jagatpal Singh* (1), and *The Commissioner of Income-tax, Bombay* v. *Ahmedbhai Umarbhai & Co.* (2)].

If I fail to see in section 9 anything pointing infallibly to the benefit of the rank trespasser, it is not from cap-

(1) (1904) I.L.R. 26 All. 393, 406. (2) 1950 S.C.R. 385.

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rice or humour, but because I conceive that an interpreter should not, when faced with the delicate task of interpreting an equivocal term in a statute, go by the letter of the law; he should steadily pierce the semantic veil and look for the true meaning with the aid of the rule of presumption that the Legislature does not intend to overthrow suddenly any fundamental juridicial norm, in particular, the rule of law, that binds and distinguishes a civilized community from savage society. This presumption is rebuttable but only by inexorably plain language. A flexible term in a statute should not therefore be so interpreted as to impair the rule of law or make any fundamental departure from the general system of the law.

Here one may quote, profitably, from the opinion, of BHAGWATI, J., in *M. K. Ranganathan* v. *Government of Madras* (1). While giving to some general words in the amendment to section 232 (1) of the Indian Companies Act a limited meaning, BHAGWATI, J., observed:

> "Whereas before the amendment the secured creditor stood outside the winding up and could, if the mortgage-deed so provided, realize his security without the intervention of the court by affecting a sale either by private treaty or by public auction, no such sale could be effected by him after the amendment and that was certainly a fundamental alteration in the law which could not be effected unless one found words used which pointed unmistakably to that conclusion or unless such intention was expressed with irresistible clearness. . . . Such a great and sudden change of policy could not be attributed to the Legislature and it would be legitimate, therefore, to adopt the narrower interpretation of those words of the amendment rather than an interpretation which would have the contrary effect."

(1) (1955) 2 S.C.R. 374.

If consideration of a mere 'great and sudden change of policy' appeared to BHAGWATI, J., to be a proper reason for not giving the whole meaning to the general words of section 232(1) of the Indian Companies Act, it would, I think, be far less proper for me to think that the word 'held' is intentionally used in section 9 by the Legislature for the purpose of acknowledging mere might as right, because the efficacy of the rule of law cannot be minimized without disastrous consequences to the society.

Adverting to the rule of literal inter-pretation I have to bear in mind that words are only inexact media of expression. I feel irresistibly inclined to quote the eloquent words of FRANKFURTER, J. in *United States of America* v. *William F. Munn* (1):

> "This question cannot be answered by closing our eyes to everything except the naked words of the Act of 30th June, 1906. The notion that because the words of a statute are plain, its meaning is also plain, is merely pernicious oversimplification. It is a wooden English doctrine of rather recent vintage . . . . to which lip-service has on occasion been given here, but which since the days of Marshall this Court has rejected, especially in practice . . . . A statute, like other living organism, derives significance and sustenance from its environment, from which it cannot be severed without being mutilated."

I do not therefore view with favour the method of looking at law as mere disembodied symmetry. Law, as I perceive it, is life and all that is intimately associated with enlightened life. To a large measure, law reflects the dominant philosophy and the mores of the times; it strives to preserve and consolidate social order and equilibrium. Consequently it is a fallacy to determine

(1) 87 L. Ed. 376, 382.

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the true denotation of a penumbric expression by syllogism alone; the Judge must bring to bear on his task a judicious combination of logic, history, utility and the accepted standards of right conduct and other similar things. In his quest he must also be guided by the traditions of the age, by precedents and by the duty of adherence to fundamental principles.

There is yet another rule of statutory construction, which should not be overlooked in interpreting the general language of section 9. This generality, if given its full swing, would give rise to a conundrum and inconsistencies. For instance, if a building *belongs to* one and is *held* by another as a trespasser, with whom the State would settle the site of the buildings? The owner or the trespasser. Again, suppose some land is deemed to be held by an intermediary as *sir* or intermediary's grove on 30th June, 1952 and on that very date a trespasser constructs a room over a portion of that land. With whom will the State settle the site of the room? According to section 18 it will be deemed to be settled with the intermediary who would become a Bhumidhar; according to section 9, if its general language is given its full sweep, it will be settled with the trespasser. A similar conflict will arise as between a *sirdar* under section 19 and a trespasser under section 9. Take a third hypothetical case. Suppose a person is recorded as occupant of some land in the *khasra* of 1356*F.*, but on 30th June, 1952 a trespasser forcibly occupies a portion of that land and builds a room over there. Section 20(*b*)(i) gives to the former Adhivasi rights and entitles him to recover under section 232 possession over the portion of land whereon the latter has built the room, but according to the wide meaning of section 9 the site of the room will be settled by the State with the latter, who cannot consequently be ejected by the former. These illustrations are, I think, sufficient to dissuade me from allowing to the general

language of section 9 its full play. I cannot imagine that the Act confers rights only to be snatched away at the next breath, nor can I suppose that the Legislature intended to stultify itself.

In the end, one has to make a choice between the broader and the narrower meaning of the word 'held' in section 9. The former has, I think, nothing to commend itself but the insulting rule of literal interpretation; the latter has the support of the rule of organic interpretation and precedents and it also harmonises with the object and setting of the Act. For my part, I have, therefore, no hesitation in adopting the narrower meaning. I would, therefore, hold that the word 'held' in section 9 refers to a person having some sort of right or title to the building as well as its site, for the word 'building' includes the site also (*Victoria City* v. *Bishop of Vancouver Island*), (1). It does not, in my opinion, refer to a person, who has encroached upon the land of some other person and erected a building over there or has taken possession over the building and the site thereof by ejecting forcibly a rightful claimant.

DESAI, C.J.:—I respectfully differ from the judgments of my brothers MUKERJI and DWIVEDI and consider that the appeal should be allowed and the suit brought against the appellants by the respondents should be dismissed. The findings of fact which cannot be challenged in second appeal are that the respondents were the owners of the constructions made on the land possessed by the appellants as their *riyayas*, that is as licensees, that they never abandoned the village, their rights as licensees and the constructions but continued to be the owners of the constructions and the licensees of the site and that during their absence the appellants unlawfully took possession of the constructions and their site, demolished the constructions and included the site in their own cattle-shed or

(1) L.R. [1921] 2 A.C. 384, 390.

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constructed a cattle-shed over it. On these findings the suit of the respondents was decreed by the trial Court and they were ordered to be restored to possession over the site of the constructions. There could have been no question of their being restored to possession over the constructions because they did not exist at all. The decree was passed on 19th January, 1952, when the U. P. Tenancy Act was in force. It was appealed from by the appellants, and during its pendency the Zamindari Abolition and Land Reforms Act came into force. The lower appellate court on 17th July, 1952, affirmed the decree of the trial court, but without considering the effect of section 9 of the Zamindari Abodition and Land Reforms Act on the rights of the parties. The appellants did not base any argument on the provisions of the section before it. They preferred a second appeal and now contended that the cattle-shed should continue to belong to them and that the site should be deemed to be settled with them by the State Government. The position on 1st July, 1952, (the date on which the new Act came into force) was that the respondents had a decree in their favour for possession over the site only. Their constructions had already been demolished and there was no question of their holding the decree for possession over them. There remained only the site to which they were entitled as licencees, and they held a decree only for restoration of possession over it. There did stand a construction on it, namely the cattle-shed, but that admittedly belonged to the appellants; they might have unlawfully trespassed on the site of the construction belonging to the respondents, unlawfully demolished them and unlawfully constructed a cattle-shed over it, still the respondent did not become owners of the cattle-shed. On account of the decree for possession over the site the cattle-shed might go to them along with the site in the execution of the decree, but it did not mean that they became owners of the cattle-shed. If 'A'

trespasses upon land of 'B' and places his chattels on it, or makes a construction on it at his own expense, he remains the owner of the chattels or the construction and neither can be said to belong to the owner of the land. The law does not make 'B' owner of the chattels or the construction merely because he is the owner of the land; otherwise he would be entitled to a decree for possession over the land and for possession over the construction and would not sue simply for possession over the land as he invariably does. Though the suit of the respondents was decreed, it was in appeal, and, since section 9 of the Zamindari Abolition and Land Reforms Act came into force on 1st July, 1952, the appellate court was bound to consider its provisions before deciding the appeal. It had not merely to see whether the decree passed by the lower court was correct or not; it had to deal with the matter as if it were itself trying the suit. When the only constructions that stood on the site belonged to, and were in the occupation of, the appellants, only the appellants could continue to own and be in occupation of them; the respondents, who were not the owners and were not even in possession of them, could not possibly be said to continue to own them after 1st July, 1952. Section 9 deals with two things; (1) a building, (I am dealing with the section as if it dealt only with a building) and (2) its site, and makes it clear that the site shall be deemed to be settled with that person who is to continue to own the building. It is impossible under the section for a building to belong to one person and its site to be settled with another. It is obvious that the first question to be decided by a Court is to whom the building is to continue to belong; the question with whom its site should be deemed to be settled will depend upon the answer to it. The words "shall continue to belong" mean, and cannot mean anything else, that whoever was the owner of the building before 1st July, 1952, will

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continue to be its owner after that date; the section does not contemplate at all that one person could be the owner before 1st July, 1952, and another, after that date One more fact to be noticed is that the words "shall continue" mean that the building itself continues; section 9 will not apply to a building which ceased to exist before 1st July, 1952. Thus it cannot be applied to the construction belonging to the respondents; they ceased to exist before 1st July, 1952 and, therefore, there was no question of their continuing to own anything, and if there was no question of their owning anything there was no question of any land being settled with them. As regards their own constructions, they were not entitled to be deemed to be settled with their site because they did not exist, and, as regards the cattle-shed it did not belong to them, and was certainly not held by them, and hence its site could not be deemed to be settled with them. Thus they did not derive any benefit from section 9 and their suit should have been dismissed by the appellate court.

In the view that I take it is unnecessary to decide what exactly is meant by the word "held". Even if the word "held" is used to mean "held under a title" or "held lawfully" the respondents could not get the benefit of section 9, because as explained above, the only building that stood on 1st July, 1952, was the cattle-shed belonging to the appellants and in their own physical possession, and, since no building belonging to the respondents stood on that date, no land could be deemed to be settled with them. On 1st July, 1952, they lost their rights as licensees (as I shall show presently) and, if they could get a decree over the site of their constructions, it could be only on the footing that the site was deemed to be settled with them; there was no other basis for a decree to be passed in their favour on or after 1st July, 1952. They could have got a decree for damages in respect of the *malba* of their constructions

or on account of the demolition of their constructions, but that is not the decree sought by them. They could have got a decree for possession over the site only if their constructions had stood on it on 1st July, 1952. According to the law it was for them to establish their title to the land; they could not get a decree on the basis of a weakness in the title of the appellants. The law is so well known that it is unnecessary to cite authorities. The appellants might or might not have been entitled to the benefit of the provisions of section 9, but if the respondents were not entitled to it their suit was doomed.

On 1st July, 1952, all the rights of the intermediaries vested in the State free from all encumbrances, which means that all the rights of persons holding under them, whether as tenants or as licensees, were extinguished. Section 9 was enacted to provide for buildings and their sites. The Legislature decided that the enforcement of the Act should not effect the rights in the buildings; they will continue as before. As regards their sites, the Legislature decided that they should be deemed to be settled with those to whom they belonged, or by whom they were held. If a person trespassing upon a land of an intermediary constructed a building, the building belonged to him and the Legislature decided that he will continue to own it as before; there is sense in this. The Legislature was not going to decide questions of title and had to leave them to be decided by courts. The abolition of Zamindari had nothing to do with ownership of buildings; the rights of intermediaries in the sites of buildings could cease and be vested in the State without the rights over the buildings being effected. After deciding that the rights over the buildings will continue unaffected, it decided that the licensee rights should go along with them, and this was quite logical. If a person trespassed upon an intermediary's land, when the intermediary lost all his rights he also lost the right to recover possession from the trespasser; he had no right to the building and could not claim that

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the building should be given to him and its site should be deemed to be settled with him. The only person who could continue to own it and with whom its site could be deemed to be settled was the trespasser. It was not a question of the State's favouring a trespasser as against a rightful owner; it had already taken away all the rights of the rightful owner by the vesting and, therefore, he was not to lose by the site not being settled with him.

The case of a building owned by one person and wrongfully possessed by another person stands on a different footing. As I said earlier, section 9 deals with two distinct matters (1) a building and (2) its site. A building may belong to one person and its site, to another person. A building may belong to one person and may be in wrongful possession of another person. A site may belong to one person and may be in wrongful possession of another person who constructs a building on it. All these cases cannot be dealt with by one rule and the failure to realise that the different cases can be governed by different rules has lead to a good deal of confusion, and, if I may say with respect to the laying down of erroneous law. The question of the meaning of the word "held" arises only when a building belonging to one person is in the actual occupation of another person; if it is in the occupation of the person to whom it belongs he will undoubtedly continue to own it, regardless of the meaning of the word "held". If the word is understood in its ordinary meaning as "is possessed" or "occupied", it applied to him, and, even if it is understood in the restricted meaning, it applies to him, as he is in possession or occupation under a lawful title, being the owner. It makes no difference whether he has a lawful title over the site or not, because one is concerned only with the building. When a building belonging to one person is in possession of another person, whether as a tenant or licensee or as a trespasser, the question will arise as to which of them is to continue to own or hold it. Several persons may have different

rights over a building, but they cannot have different rights over its site; the site can be deemed to be settled with only one of them. It follows therefore that only one of the persons claiming different rights in a building is contemplated by the phrase "belonging to or held by". Though a building can be said to belong to one person and to be held by another person, section 9 contemplates that only one of them is the person to whom the phrase "belonging to or held by" can apply. The well-known canon of interpretation of statutes which avoids absurdities requires the Court to hold that if "A" undoubtedly comes within a statute it should be interpreted so as to avoid 'B' also coming in, if both 'A' 'B' cannot come in at the same time. When an owner of a building has let it out to a tenant or a licensee he may be deemed to be the person contemplated by the phrase and its site can be deemed to be settled with him and not with the tenant, or the licensee. In other words, "belonging to or held by" can be understood to mean "owned by", and where there is no question of ownership, "possessed by". Where a building is in the possession of a trespasser and the right of the owner is not lost by lapse of time it certainly belongs to him, and, since the phrase "belonging to or held by" must apply to only one person, it cannot be said to be "held" by the trespasser. It seems to me that once the Court finds that it belongs to a certain person, it is necessary for it to find by whom it is held; as I said earlier, an enquiry into who holds it will be necessary only when an enquiry to whom it belongs is not appropriate. The rightful owner will continue to own the building, notwithstanding its being in the possession of a trespasser and its site will be deemed to be settled with him. These are the only cases in which the site is deemed to be settled with a person who is not in occupation of the building and the present case is of a different kind and is similar to the case in *Bharat v. Ch. Khazan Singh* (1). Neither the judgment of my learned brothers nor the argument

(1) 1957 A.L.J. 743.

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in this case has persuaded me that either that case was wrongly decided or that the facts in the present case are different.

Section 9 deals with all buildings without regard to their ownership and occupation; buildings in the occupation of their owners (or persons claiming under them) are as much within its scope as buildings in occupation of trespassers. As the rights of the intermediaries vested in the State free from all encumbrances, the Legislature had to make provision in respect of rights in buildings and their sites and section 9 is the only provision. Consequently it deals with all buildings howsoever owned and howsoever occupied. The phrase "belonging to or held by" must be so interpreted as to bring within the scope of the section cases of all buildings, howsoever owned and howsoever held. The first question to be considered is not what is the meaning of the phrase, but who is the one person in respect of whom it can be said that the building belongs to, is held by, him; go into the meaning only if you cannot answer it, i.e. you find that more than one person might come within the scope of the phrase. It is beyond comprehension now in the present case that the cattle-shed can be said to belong to, or be held by, the respondents. The appellants are the only person to whom the phrase can apply and the site must be deemed to be settled with them. As I said previously, I respectfully disagree with the view taken in *Pheku Chamar* v. *Harish Chandra* (1). The appeal should be allowed and the connected appeals should be decided in accordance with the views expressed above.

BY THE COURT—For the reasons given in our separate judgments, we are of the opinion that this appeal should be dismissed and we direct accordingly. We are also of the opinion that under the circumstances of the case, the parties should bear their own costs of the appeal. The costs of the courts below remain unaltered by our order.

Appeal dismissed.

(1) 1955 A.L.J. 197.

CRIMINAL REVISION

Before Mr. Justice Upadhya and Mr. Justice Srivastava

KALLAN KHAN

v.

STATE

1960
September,
23.

Foreigner entering India on a visa—*Duties and liabilities of, regarding registration and stay in India—Foreigners Act,* 1946, *ss.* 3(2) (*c*) *and* 14—*Foreigners Order,* 1948, *para* 7.

(*Obiter*) paragraph 7 of the Foreigners Order, 1948, imposes on a foreigner entering India on the authority of a *visa* a two-fold duty: (*a*) to obtain a permit indicating the period during which he is authorised to remain in India, and (*b*) to deport from India before the expiry of the period so fixed or extended by the Central Government. A violation of either of these conditions by itself amounts to an offence punishable under s. 14 read with s. 3(2) (*c*) of the Foreigners Act.

Wahid Mian v. *State* (1) referred to.

Criminal Revision no. 1736 of 1959 from an order of J. P. CHATURVEDI, II Addl. Sessions Judge, Moradabad, dated 30th September, 1959.

The facts appear in the judgment.

[The case was at first heard by BROOME, J. who referred the case to a Bench for decision of a question] by the following referring order—

BROOME, J.:—Kallan Khan, the applicant in this criminal revision, was convicted by a first class Magistrate of Moradabad for an offence under section 3/14 of the Foreigners Act and was sentenced to one year's simple imprisonment and a fine of Rs.25. In appeal the Additional Sessions Judge of Moradabad, while confirming the conviction, reduced the sentence to six months' S. I. and a fine of Rs.25.

The prosecution allegations were that the accused entered India on March 29, 1957 on a Pakistan Passport

(1) 1960 A. L. J. 179.

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which he had obtained in July 1955 and an Indian visa granted on March 26, 1957. The period of his visa was extended by the District Magistrate of Moradabad upto July 12, 1957; but after the expiry of that date he continued to reside in India without permission. Even after he had been served with a notice on February 25, 1958 requiring him to leave India within 30 days he still stayed on and was consequently prosecuted.

It appears that the accused was born in India and migrated to Pakistan soon after the partition, but was unable to find satisfactory accommodation and employment there and hence decided to come back to India. I am satisfied that when he re-entered India on March 29, 1957 on a Pakistan Passport, he was a foreigner as defined in section 2 of the Foreigners Act (as amended by Act XI of 1957). The question is however whether, on the facts alleged, he can legally be convicted under section 3/14 of the Foreigners Act. The charge framed against him was:

> That you on or about the 12th day of July 1957, being a foreigner, were found remaining in India without any valid passport and permission.

In effect he was charged with non-compliance with section 7 of the Foreigners Order 1948 (made by the Central Government in exercise of the powers conferred by section 3 of the Foreigners Act, 1946), which runs as follows:

> "*Restriction on sojourn in India*—Every foreigner who enters India on the authority of a visa issued in pursuance of the Indian Passport Act, 1920 (XXXIV of 1920) shall obtain from the Registration Officer having jurisdiction, either at the place at which the said foreigner enters India or at the place at which he presents a registration report in

accordance with rule 6 of the Registration of Foreigners Rules, 1939, a permit indicating the period during which he is authorised to remain in India and shall, unless the period indicated in the permit is extended by the Central Government, depart from India before the expiry of the said period; and at that time of the foreigner's departure from India the permit shall be surendered by him to the Registration Officer having jurisdiction at the place from which he departs."

This section lays down that a foreigner entering India must obtain a permit from a Registration Officer and must leave India before the period indicated in this permit expires. But in the present case no attempt has been made by the prosecution to produce any such permit or to prove what period was mentioned therein. In my view therefore the applicant could not be convicted under section 3/14 of the Foreigners Act for non-compliance with section 7 of the Foreigners Order 1948.

My attention has however been drawn to the decision of a learned Single Judge of this Court in *Wahid Mian* v. *State* (1) in which it has been held that a foreigner can be convicted for not leaving India within the period indicated in his visa, the argument being that the period shown in the permit referred to in section 7 of the Foreigners Order must be the same as the period shown in the visa. With great respect I find myself unable to agree with this view. It cannot be assumed that a permit must inevitably be issued to every foreigner entering India; and if in any particular case a foreigner does not obtain "a permit indicating the period during which he is authorised to remain in India", how can he be held liable to leave

(1) 1960 A.L.J. 179.

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India "before the expiry of the said period"? It may well be that the period noted in the permit would normally correspond with the period shown in the visa; but when section 7 refers only to the period indicated in the *permit* and does not require the foreigner to leave India within the time shown in his *visa*, it does not seem to me that the prosecution can be allowed to dispense with the production of the permit, if it wishes to obtain a conviction.

The view propounded by me that a conviction for infringement of section 7 of the Foreigners Order requires proof of (*a*) issue of a permit and of (*b*) staying on in India beyond the period mentioned in the permit, finds supports in *State of Madhya Pradesh* v. *Mumtaz Ali Faiz Ali* (1) as well as in *State* v. *Muhammad Khan Naurang Khan* (2) and is implied in the decision given by a Division Bench of this Court in *State* v. *Yaqub* (3).

In view of the fact that this problem is likely to arise in a large number of cases, I direct that the papers of this case be laid before Hon'ble the Chief Justice with the request that the following question be referred for decision to a larger Bench:

> "In order to sustain conviction under section 14 read with section 3(2) (*c*) of the Foreigners Act, is it necessary to prove (*a*) that a *permit* was issued to the accused under section 7 of the Foreigners Order and (*b*) that the accused stayed on in India after the expiry of the period *indicated in the permit;* or can the accused be convicted merely for staying on beyond the period shown in his *visa* ?"

(1) A. I. R. 1959 M. P. 387. (2) A.I.R. 1959 Bom. 359.
(3) I.L.R. [1961] 1 All. 275.

[The case was then laid before UPADHYA and SRIVASTAVA, JJ.]

A. B. Saran for the applicant.

The Assistant Government Advocate for the State.

The judgment of the court was delivered by—

SRIVASTAVA, J.:—This application in revision has been referred to this Bench for the decision of the following question:

> "In order to sustain a conviction under section 14 read with section 3(2) (*c*) of the Foreigners Act, is it necessary to prove (*a*) that a *permit* was issued to the accused under section 7 of the Foreigners Order and (*b*) that the accused stayed on in India after the expiry of the period *indicated in the permit;* or can the accused be convicted merely for staying on beyond the period shown in his *visa* ?"

The applicant Kallan Khan had migrated to Pakistan. He obtained a passport bearing no. 330621 from the Pakistan Government on the 5th July, 1955 and also obtained *visa* no. 28781-82 of the 26th March, 1957. The visa was of category 'C'. He entered India on the basis of the passport and the *visa* and reported his arrival at police station Mundha on the 30th March, 1957. The District Magistrate of the place granted him a permit entitling him to remain in India till the 12th July, 1957 and fixing the time of exit from India as the 14th July of that year. The permit was never extended but the applicant continued residing in India beyond the period fixed in the permit. On the 25th February, 1958 a notice was given to him requiring him to leave India within thirty days but as he did not comply with it he was prosecuted under section 3 read with section 14 of the

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Foreigners Act. The charge framed against him read as follows:

> "That you on or about the 12th day of July 1957, being a foreigner, were found remaining in India without any valid passport and permission and thereby committed an offence punishable under section 3/14 of Foreigners Act, 1946 and within my cognizance."

The applicant pleaded not guilty. He said that he was an Indian national who had gone to Pakistan but had come back from the place in 1957 because he could not get any employment there. He denied that he had been living in India without permission.

The Magistrate, who tried the case, found the applicant guilty of the charge framed against him and sentenced him to undergo simple imprisonment for one year and also to pay a fine of Rs.25. In default of the payment of fine he was directed to undergo further simple imprisonment for one month.

The applicant preferred an appeal to the Sessions Judge who admitted the appeal on the point of severity of sentence. He dismissed the appeal but reduced the sentence to six months' simple imprisonment but maintained the sentence of fine.

The applicant then applied to this Court in revision and the application first came up for disposal before Mr. Justice BROOME. He felt satisfied that the applicant was a foreigner at the time when he had re-entered India, on the 29th March, 1957 on the basis of his Pakistani passport and the *visa* granted to him. It was contended before the learned Judge that the conviction of the applicant could not be maintained because the prosecution had not proved that any permit had been granted to him as required by paragraph 7 of the Foreigners Order, 1948 and that he had overstayed that

permit. It was urged on behalf of the State on the basis of the decision reported in *Wahid Mian* v. *State* (1) that irrespective of the question whether the permit was or was not issued a foreigner could be convicted for not leaving India within the period indicated in his *visa*. Mr. Justice BROOME felt somewhat doubtful about the correctness of that decision and finding the question to be a question which was likely to arise in a large number of cases be referred the question which we have mentioned at the beginning of this judgment to a Division Bench for decision.

It is obvious that before the learned Judge the case was argued on the basis that though the applicant possessed a passport of the Pakistan Government and had also obtained the necessary *visa* there was nothing to show that he had obtained a permit for stay as required by paragraph 7 of the Foreigners Order, 1948. It was on that basis that the applicant contended in support of the application in revision that till it was proved that a permit for a particular period had been issued and that the applicant had overstayed that period the applicant could not be convicted under section 3(2) (c) read with section 14 of the Foreigners Act, 1946 for the breach of paragraph 7 of the Foreigners Order 1948.

With the help of learned counsel we have perused the record and have seen the passport of the applicant which was filed by him. The passport shows that it was issued originally by the Pakistan Government in 1955. The applicant then obtained a *visa* of category 'C' from the Visa Officer on the 8th July, 1955. It was valid till the 7th October, 1955. He left Pakistan on the 13th July, 1955 and entered India on the 14th July of that year. He then obtained a permit as required by paragraph 7 of the Foreigners Order, 1948 which entitled him to remain in India till the 21st

(1) 1960 A. L. J. 179.

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October, 1955 and fixed the time for his exit from India as the 31st October, 1955. The period of the permit was subsequently extended first in December, 1955, then in March, 1956 and again in May, 1956. The applicant then left India for Pakistan. On the 26th March, 1957 he again obtained a *visa* from the Indian High Commissioner at Lahore, visa no. 28781-82, dated the 28th March, 1957. The visa was for a period of six months and on the basis of the *visa* he entered India on the 29th March, 1957. He reported himself at thana Mundha, district Moradabad, and obtained from the District Magistrate of Moradabad a permit required by paragraph 7 of the Foreigners Order, 1948 on the 26th June, 1957. The permit entitled him to remain in India till the 12th July, 1957 and fixed the time for his exit from this country as the 14th July, 1957. The applicant did not get the period of this permit extended in any manner but continued residing in India till a notice was served upon him requiring him to leave the country within thirty days.

It is thus clear that the case that the applicant had not obtained any permit as required by paragraph 7 of the Foreigners Order, 1948 and that there was nothing to show the period entered in the permit to enable the Court to find whether the applicant had overstayed that period was not correct. A permit as required by that paragraph had been issued to the applicant. According to that permit he could stay in India only till the 12th July, 1957 and was bound to leave India before the 14th of that month. The period was never extended. If, therefore, he continued staying in India beyond the 12th July, 1957 he clearly committed a breach of paragraph 7 of the Foreigners Order, 1948 and was on that account liable to be punished under section 14 read with section 3(2) (*c*) of the Foreigners Act, 1946. His stand that the presecution

had not proved that any permit had been issued to him and that he had stayed in India beyond the period of the permit was, therefore, wholly unjustified.

In view of the facts above mentioned the question referred to us does not really arise in this case. As, however, the case has come to us only for answering the question we proceed to consider it.

Paragraph 7 of the Foreigners Order, 1948 reads as follows:

> "Every foreigner who enters India on the authority of a *visa* issued in pursuance of the Indian Passport Act, 1920 (XXXIV of 1920) shall obtain from the Registration Officer having jurisdiction either at the place at which the said foreigner enters India or at the place at which he presents a registration report in accordance with rule 6 of the Registration of Foreigners, a permit indicating the period during which he is authorized to remain in India and shall unless the period indicated in the permit is extended by the Central Government, depart from India before the expiry of the said period; and at the time of foreigner's departure from India the permit shall be surrendered by him to the Registration Officer having jurisdiction at the place from which he departs."

It will be noticed that paragraph 7 provides for two things. In the first place, it provides that every foreigner shall obtain a permit indicating the period during which he is authorised to remain in India. It also provides that the foreigner concerned must unless the period is extended by the Central Government depart from India before the expiry of that period. Thus the duty of obtaining a permit is also enjoined by this paragraph on the foreigner. He, therefore, commits a breach of its provision not only by overstaying the limits of the permit if one is granted to him

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but also by omitting to obtain a permit. In either case the foreigner concerned will be liable to be convicted under section 14 read with section 3(2) (*c*) of the Foreigners Act.

Remaining in India beyond the period mentioned in the *visa* may be actionable under the Indian Passport Act of 1920 or the Indian Passport Rules of 1950. In order to attract the penalties provided in section 14 of the Foreigners Act it is necessary that there must be some contravention of the provisions of the Act itself or of any order made thereunder or any direction given in pursuance of the Act or the Order. If the allegation is that paragraph 7 of the Foreigners Order, 1948 which has been issued under the Foreigners Act has been contravened it must be proved either that the person concerned had omitted to obtain a permit as required by that paragraph or that he had overstayed the period provided in that permit.

The case will now go back to the learned Judge who made the reference with the above opinion.

Question answered.

APPELLATE CRIMINAL

Before Mr. Justice Uniyal and Mr. Justice Sharma

AYUB

v.

STATE

1961

March, 14.

Code of Criminal Procedure, 1898, *ss.* 195, 476, 559—*If a temporary Sessions Judge who takes over the file of another temporary Sessions Judge in the same sessions division, can make a complaint under s.* 476, *Cr. P. C. in respect of the offence under s.* 195, *Cr. P. C. committed in the court of his predecessor.*

The question referred to the Division Bench by the learned Single Judge was "whether on a temporary Sessions Judge being transferred from a judgeship, another temporary Sessions Judge who is appointed to that judgeship and takes over the file of the transferred officer can exercise the powers of the first officer as 'successor-in-office' under s. 476, Code of Criminal Procedure in respect of offences enumerated in s. 195 of the Code that were committed in the court of his predecessor."

The Bench after considering the question at length:

Held, (i) that a temporary Sessions Judge who takes over the file of another temporary Sessions Judge in the same sessions division as to all intents and purposes a presiding officer of the court of Session and as such exercises the powers and performs the duties of that court.

(ii) that a temporary Sessions Judge can therefore make a complaint under s. 476, Code of Criminal Procedure in respect of the offences falling under s. 195 of the Code that were committed in the court of his predecessor.

(iii) that the answer to the question referred must, therefore, be in the affirmative.

Case-law discussed.

Criminal Appeal no. 960 of 1960, from an order of D. B. LAL, Sessions Judge, Allahabad, dated the 22nd April, 1960 in Criminal Sessions Trial no. 107 of 1959.

(The case was at first heard by BROOME, J. who referred a question of law to a Bench).

The facts appear in the judgment.

Gopal Behari, for the appellant.

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The judgment of the court was delivered by—

UNIYAL, J.:—In this case the question referred to us for decision is as follows:

> "Whether on a Temporary Sessions Judge being transferred from a judgeship (presumably meaning sessions division) another Temporary Sessions Judge who is appointed to that judgeship (sessions division) and takes over the file of the transferred officer, can exercise the powers of the first officer as 'successor in office' under section 559, Criminal Procedure Code; and whether as successor he can make complaints under section 476, Criminal Procedure Code in respect of offences enumerated in section 195, Criminal Procedure Code that were committed in the court of his predecessor?"

For a proper understanding of the question raised it is necessary to state shortly the facts of the case in which this reference has been made. The appellant was tried for the offence of attempted murder and other offences in the court of the Second Temporary Sessions Judge (Sri PREM PRAKASH) who convicted the appellant, *inter alia*, on the finding that he had produced fabricated *alibi* evidence in his defence. After the decision of that case Sri PREM PRAKASH was transferred and his place was taken by another Temporary Sessions Judge, Sri CHANDRA PRAKASH. An application under section 476, Criminal Procedure Code was then made before the latter officer for the prosecution of the appellant under section 193 Indian Penal Code. After holding a preliminary inquiry and being satisfied that a *prima facie* case had been made out the second officer (Sri CHANDRA PRAKASH) filed a complaint against the applicant in respect of an offence mentioned in section 195, Criminal Procedure Code. The appellant was eventually, convicted of the offence under section 471,

Indian Penal Code against which he filed an appeal to this Court and the same was heard by BROOME, J. It was contended before the learned single Judge that the Temporary Sessions Judge, that is, Sri CHANDRA PRAKASH could not be the 'successor-in-office' of another Temporary Sessions Judge, that is, Sri Prem Prakash, even though the former had been appointed to the same sessions division and assumed charge of cases left on the file of the latter. Reliance was sought to be placed on certain observation made by DESAI, J. (as he then was) in *Ramzani* v. *State* (1) in which it was held that section 559(1), Criminal Procedure Code is applicable to permanent courts and not to temporary ones. BROOME, J. was of the opinion that the view expressed in the case of *Ramzani* (1) was "too narrow and rigid" and required reconsideration and hence referred the above question for decision to a larger bench.

In order to appreciate the controversy it is necessary first to comprehend the scope of section 476, Criminal Procedure Code. Section 476(1) is in these terms:

> "Where any civil, revenue or criminal court is, whether on application made to it in this behalf or otherwise, of opinion that it is expedient in the interest of justice that inquiry should be made into any offence referred to in section 195, sub-section (1) clause (*b*) or clause (*c*) which appears to have been committed in or in relation to a proceeding in that court, such court may, after such preliminary inquiry, if any, as it thinks necessary, record a finding to that effect and make a complaint thereof in writing signed by the presiding officer of the court, and shall forward the same to a magistrate of the first class having jurisdiction. . . ."

Section 476(1), Criminal Procedure Code defines the form, scope and nature of the complaint mentioned in

(1) A. I. R. 1960 All. 350.

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clauses (*b*) and (*c*) of sub-section 476 must be read with the two clauses of section 195 when any question about a prosecution started upon the complaint of a court arises.

Clauses (*b*) and (*c*) of section 195 when read with the provisions of sub-section (1) of section 476 lead to the conclusion that the power under section 476 may be exercised either by the court which tried the case in the trial of which the alleged offence was committed, or by the court to which such court is subordinate. The plain language of clauses (*b*) and (*c*) of section 195 itself leaves no room for doubt that the power under section 476 may be exercised by a successor even though the trial of the case had not been conducted by him. The only limitation placed on the power of the court making the complaint is that he should be the presiding officer of the 'court'.

This leads us to the consideration of the question as to the meaning of the words 'presiding officer of the court'. Section 9 of the Code of Criminal Procedure lays down that the State Government shall establish a court of session for every sessions division and appoint a judge (Sessions Judge) of such court, and Additional Sessions Judges and Assistant Sessions Judges to exercise jurisdiction in such court and to direct at what place or places the court of session shall sit. Under the Code of Criminal Procedure there is one 'court' in each sessions division which is manned by a number of judges. The officers presiding over such court are described as Sessions Judge, Additional Sessions Judge, Temporary Sessions Judge, etc. and all of them exercise the same powers in the sessions division to which they are appointed.

The courts have held that under section 476, Criminal Procedure Code the power to direct prosecution is

conferred on the 'court' and not on the particular officer who fills a judicial office at a particular time, irrespective of the fact whether the particular officer is a temporary or a permanent judge of that court. The nomenclature given to his office cannot affect his status as judge of the Court of Session.

In *re Lakshmi Lal Ji* (1) their Lordships of the Bombay High Court held that the word 'court' in section 476, Criminal Procedure Code means the Court of Session and would include the judges constituting that court and exercising the powers of Court of Session within the sessions division. Their Lordships observed :

> "But if the 'court' taking the word in its ordinary signification, remains the same throughout, though an individual judge constituting it and performing its function may vary from time to time, we fail to perceive, with due deference, how an offence committed before that court or brought to its notice in the course of a judicial proceeding before it, ceases to be such because the individual judge who tried the case or heard the proceeding ceased to be the presiding judge of that court."

In *Bahadur* v. *Iradatullah Malik* (2) a Full Bench of the Calcutta High Court held that the word 'court' in section 476, Criminal Procedure Code includes the successor of the judge before whom the alleged offence was committed or to whose notice the commission of it was brought in the course of a judicial proceeding. Their Lordships observed :

> "There is nothing in that section to warrant the withholding from the word 'court' its natural meaning with the sense of continuity this implies, notwithstanding any change of officers."

(1) (1908) I.L.R. 32 Bom. 184. (2) (1910) I.L.R. 37 Cal. 642.

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In *Superintendent and Remembrancer of Legal Affairs, Bengal* v. *Izatullah Paikar* (1), the Additional Sessions Judge of Pabna had issued notice to certain witnesses who had made false statements before him in the course of a sessions trial, to show cause why they should not be prosecuted for perjury under section 193, Indian Penal Code. The said Additional Sessions Judge was transferred from Pabna and the persons against whom notice had been issued appeared before the Sessions Judge of Pabna and showed cause in respect of the notice. Thereupon the Sessions Judge made a formal complaint against them under section 193, Indian Penal Code. In appeal it was contended on behalf of the appellants that the Sessions Judge of Pabna had no power to make the complaint under section 476(1) because the offence, if any, had been committed not in his court but in the court of the Additional Sessions Judge. The objection of the appellants was overruled by their Lordships and it was held that the offence under section 193 of the Indian Penal Code was committed, if at all, before the Court of Session at Pabna and the complaint was made by a judge of that court. Their Lordships pointed out—

> "It is inaccurate to refer to the 'court of the Sessions Judge' and the 'court of the Additional Sessions Judge', and so on, except coloquially. Just as in the High Court we do not refer to the constituent courts as the court of any particular Judge, either 'parmanent' or 'additional', it is one Court of Session which is constituted by a number of judges."

They were of opinion that the Sessions Judge of Pabna was competent to make the complaint under section 476(1) of the Code, even though the offence in respect of which the complaint had been made was committed in the court of the Additional Sessions Judge.

(1) (1931) I.L.R. 58 Cal., 1117.

In *Kasturbai* v. *Malidas Lakshmi Das* (1), MULLA, J. of the Bombay High Court issued notice to one of the parties to show cause why he should not be prosecuted for the offence of perjury for having made a false statement before him. After issuing the rule MULLA, J. retired as Judge of that court. The matter then came before CRUMP, J. of that High Court, and it was contended that he (CRUMP, J.) had no jurisdiction to dispose of the rule granted by MULLA, J. The question that arose for consideration in that case was whether the word 'court' in section 476 must be taken to mean the High Court or the individual Judge before whom the offence was committed. It was held that—

> "The expression 'court' for the purpose of section 476(1), Criminal Procedure Code must be taken to mean 'High Court', and if that is so—as any Judge of the High Court has power to exercise powers of the High Court—it would follow that any Judge could dispose of an application under section 476 whether the matter out of which the action arose was heard by him or some other Judge of the Court. No doubt as a matter of convenience that would seldom be done but where, as in the present I see nothing in the language of the section to preclude any Judge from disposing of such matter as is now before him."

The same view was expressed by the Madras High Court in *Varadajulu Naidu* v. *Emperor* (2). In that case during the trial of a civil case before the Chief Justice it was found that certain documents were fabricated and had been used by one of the defendants in the suit knowing them to be such. The Chief Justice directed the complaint to be filed against the defendant under section 466 of the Indian Penal Code. Due to some error no formal complaint was filed with the result that the proceedings were quashed. Subsequently a

(1) (1925) I.L.R. 49 Bom. 710. (2) A.I.R. 1937 Mad. 716.

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written complaint was duly filed by an order of the officiating Chief Justice in the absence of the Chief Justice. Objection was taken to the validity of the complaint on the ground that the officiating Chief Justice was not the court before whom the offence had been committed. Their Lordships while overruling the objection observed as follows :

> "The order was in terms passed under section 476, Criminal Procedure Code and the real question is whether the officiating Chief Justice has no jurisdiction to pass the order. The complaint required by section 195, Criminal Procedure Code is the complaint of the court in which the documents were given in evidence, and not of the trial judge, and as pointed out in *Kasturbai* v. *Vannmalidas Lakhmi Das* (1) when a suit is tried by a Judge of the High Court the term 'court' occurring in the section must be deemed to mean 'High Court'. There is nothing to prevent any Judge of the High Court from dealing with the matter though as a matter of convenience this would seldom be done, and the matter was in this case placed before the officiating Chief Justice as the trial judge was absent at that time."

The above discussion leads to the conclusion that an officer who is exercising the powers of a 'court of session' would be competent to file a complaint under section 476 in respect of an offence committed in or in relation to a proceeding before another officer of that court. In such a case it is wholly immaterial whether the officer concerned is a temporary or permanent incumbent of that court. The real test is whether the second officer, like the first, is a presiding officer of that court. It would, in our opinion, be immaterial whether the judge or the officer filing the complaint is successor in office of the first officer or not.

(1) (1925) I.L.R. 49 Bom. 710.

Section 559(1) of the Criminal Code provides that the powers and duties of a judge or magistrate may be exercised or performed by his successor in office. It will be seen that the powers under the Code have been conferred on courts and not on individual judges or magistrates. Therefore, in order to determine whether a judge or magistrate is 'successor in office' what has to be seen is whether the particular judge or magistrate can be considered to be a presiding officer of the court over which his predecessor exercised jurisdiction. The circumstance that a particular judge or magistrate is a temporary or permanent incumbent is not a relevant consideration, and cannot make any difference to his status as a "court".

On the facts of the case as here it appears to us clear that the second Temporary Sessions Judge (Sri Chandra Prakash) was the successor of the first officer (Sri Prem Prakash) before whom the offence was committed. The Sessions Judge had actually allotted to him the entire case work on the file of the first officer and thus determined his status as successor under section 559(3) of the Criminal Procedure Code.

The case of *Ramzani* v. *State* (1) has really no bearing on the facts of the present case. There the court was considering the powers and duties of magistrates in general and had expressed the view that there is no permanent court of the magistrate of the first class created as such and therefore it can not be said that the court of one magistrate is the same as the court of another magistrate exercising jurisdiction over the same territory. It was observed in that case that—

> "Since the court of a magistrate of the first class is not a permanent court the Government has the power of creating as many courts as it likes and can go on changing their territorial limits."

(1) A.I.R. 1960 All. 350.

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Mr. Justice DESAI (as he then was) was, therefore, of opinion that a Magistrate of the first class as such could not be said to be an officer presiding over a court in the strict sense of the term. It was, therefore, held that a Magistrate could not make a complaint under section 476, Criminal Procedure Code in respect of an offence mentioned in section 195, Criminal Procedure Code committed before another magistrate.

We think that where a magistrate is presiding over a 'court' and is succeeded by another in a temporary vacancy the latter, if invested with the powers of the court over which the first officer presided, would be competent to file a complaint under section 476, Criminal Procedure Code. The nature of his appointment, though temporary, would not in our view affect his powers as the presiding officer of that court.

In *Kartik Chandra Maity* (1) the Sub-Divisional Officer of Jamshedpur received information of an alleged offence and took cognizance of that offence and directed issue of a warrant of arrest against certain persons. In the meantime he left the station temporarily on duty. The State Government appointed one Mr. Chatterji, a first class Magistrate, to perform the duties of the Sub-Divisional Officer during his absence. He signed the warrant in the absence of the Sub-Divisional Officer as required by section 75 of the Criminal Procedure Code. There was unlawful resistance to the execution of the warrant and the persons concerned were prosecuted and convicted. It was contended before the High Court that Mr. Chatterji who had signed the warrant was not the presiding officer of the court of the Sub-Divisional Officer and, as such, he had no authority to issue the warrant.

(1) A.I.R. 1959 Pat. 175.

The Patna High Court repelled the contention and held that where a magistrate is appointed by Government with power to take cognizance of offences and to perform the functions of the Sub-Divisional Officer while the latter is away from the station, he is the presiding officer within the meaning of section 75, Criminal Procedure Code. It was pointed out that although under section 204, Criminal Procedure Code only the magistrate who has taken cognizance of an offence may direct the issue of warrant, nevertheless the magistrate who signs the warrant, provided he comes within the term 'presiding officer' may sign the warrant although he may not have been the particular individual who has taken cognizance of the offence. The mere fact that in that case Mr. Chatterji who signed the warrant was holding charge of the Sub-Divisional Officer temporarily did not make any difference to his powers as the presiding officer of that court.

We think that the view taken by the Patna High Court is in consonance with the provisions of the Code. We are clearly of opinion that a Temporary Sessions Judge who takes over the file of another Temporary Sessions Judge in the same sessions division is to all intents and purposes a presiding officer of the court of session and, as such, exercises the powers and performs the duties of that court. He can, therefore, make a complaint under section 476, Criminal Procedure Code in respect of the offences falling under section 195, Criminal Procedure Code that were committed in the court of his predecessor.

The answer to the question referred to us must therefore be in the affirmative.

Question answered affirmatively.

SUPREME COURT

APPELLATE CIVIL

1961
March, 30

Before the Hon'ble Mr. Justice Gajendragadkar, and Hon'ble Mr. Justice Wanchoo

RAJA HARISH CHANDRA RAJ SINGH
(APPELLANT)

v.

THE DEPUTY LAND ACQUISITION OFFICER
AND ANOTHER (RESPONDENTS)

Land Acquisition—*Award of Collector—Application for reference of objection on award to court for decision—Limitation for " . . . . six months from the date of Collector's award "—Meaning of—Land Acquisition Act,* 1894, *s.* 18, *proviso (b).*

The limitation for an application under s. 18 of the Land Acquisition Act to refer the objection against the award of the Collector to the Court for decision *inter alia* is " six months from the date of the Collector's award . . . . " The knowledge of the party affected by the award being an essential requirement of fair play and natural justice, the expression "the date of the award" means not the date when the physical act of writing or signing the award was done but the date when the award is either communicated to the party or otherwise comes to his knowledge actually or constructively.

Macdonald v. Secretary of State for India in Council (1) and *Hari Das Pal v. The Municipal Board, Lucknow* (2) approved.

Jehangir Bomanji v. G. D. Gaikwad (3) and *State of Travancore-Cochin v. Narayani Amma Ponnamma* (4) overruled.

Civil Appeal nos. 25 and 26 of 1958 from the judgments and decrees, dated the 7th August, 1956 of the Allahabad High Court in Special Appeals nos. 151 and 152 of 1955.

The facts appear in the judgment.

(1) (1905) 4 I.C. 914.
(2) (1911) 22 I.C. 652.
(3) A.I.R. 1954 Bom. 419.
(4) A.I.R. 1958 Ker. 272.

C. B. Agarwala, Senior Advocate (*A. N. Goyal* and *Mohan Lal Agarwala* Advocates, with him) for the appellant.

Gopi Nath Dikshit and *C. P. Lal* Advocates for the respondents.

The following judgment of the Court was delivered by—

GAJENDRAGADKAR, J.:—These two appeals arise out of two writ petitions filed by the appellant Raja Harish Chandra Raj Singh against the respondents the Deputy Land Acquisition Officer and another in the Allahabad High Court and they were based on the same facts and asked for the same relief. Both of them raise a short common question of limitation the decision of which would depend upon the determination of the scope and effect of the provisions of the proviso to section 18 of the Land Acquisition Act, I of 1894 (hereafter called the Act). Since the facts in both the appeals are substantially the same we would refer to the facts in Civil Appeal no. 25 of 1958. The decision in this appeal would govern the decision of the other appeal, Civil Appeal no. 26 of 1958.

The appellant Raja Harish Chandra Raj Singh was the proprietor of a village Beljuri in the District of Naini Tal. It appears that proceedings for compulsory acquisition of land including the said village for a public purpose were commenced by respondent 2, the State of Uttar Pradesh; notifications under sections 4 and 6 of the Act were issued in that behalf, and the provisions of section 17 were also made applicable. Accordingly, after the notice under section 9(1) of the Act was published possession of land was taken by the Collector on 19th March, 1960. Thereupon the appellant filed his claim to compensation for the land acquired in accordance with section 9(2), and proceedings were held by the Deputy Land Acquisition Officer, respondent 1, for determining the amount of compensation. It appears that in these proceedings an award

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was made, signed and filed in his office by respondent 1 on 25th March, 1951. No notice of this award was, however, given to the appellant as required by section 12(2) and it was only on or about 13th January, 1958, that he received information about the making of the said award. The appellant, then filed an application on 24th February, 1958, under section 18 requiring that the matter be referred for the determination of the Court, as, according to the appellant, the compensation amount determined by respondent 1 was quite inadequate. Respondent 1 took the view that the application thus made by the appellant was beyond time under the proviso to section 18 and so he rejected it. The appellant then filed a writ petition in the Allahabad High Court on 21st December, 1958, in which he claimed appropriate reliefs in respect of the order passed by respondent 1 on his application made under section 18. This petition was heard by MEHROTRA, J., and was allowed. The learned Judge directed respondent 1 to consider the application made by the appellant on the merits and deal with it in accordance with law. He held that in dealing with the said application respondent 1 should treat the application as filed in time. Against this decision the respondents preferred an appeal to a Division Bench of the said High Court. MOOTHAM, C. J., and CHATURVEDI, J., who heard this appeal took the view that the application filed by the appellant under section 18 of the Act was barred by time, and so they allowed the appeal, set aside the order passed by MEHROTRA, J., and dismissed the writ petition filed by the appellant. The appellant then moved for and obtained a certificate from the said High Court and it is with this certificate that he has come to this Court in the present appeal; and so the short question which the appellant raises for our decision is whether the application filed by him under section 18 of the Act was in time or not.

Before proceeding to construe the material provisions of section 18 it is necessary to refer very briefly to some other sections of the Act which are relevant in order to appreciate the background of the scheme in relation to land acquisition proceedings. Section 4 deals with the publication of the preliminary notification and prescribes the powers of the appropriate officers. Whenever it appears to the appropriate Government that land in any locality is needed for any public purpose a notification to that effect shall be published in the official *Gazette* and a public notice of its substance shall be given at convenient places in the said locality; that is the effect of section 4(1). Section 4(2) deals with the powers of the appropriate authorities. Section 5-A provides for the hearing of objections filed by persons interested in any land which has been notified under section 4(1). After the objections are thus considered a declaration that land is required for a public purpose follows under section 6(1). Section 6(2) provides for the publication of the said declaration; and section 6(3) makes the declaration conclusive evidence that the land is needed for a public purpose. Section 9 requires the Collector to give public notice in the manner specified stating that the Government intend to take possession of the land and calling for claims to compensation in respect of all interests in such land. Section 9(2) prescribes the particulars of such notice, and section 9(3) and (4) provide for the manner of serving such notice. Section 11 deals with the enquiry and provides for the making of the award by the Collector. Section 12(1) then lays down that the award when made by the Collector shall be filed in his office, and shall, except as otherwise provided, be final and conclusive evidence as between the Collector and the persons interested whether they have respectively appeared before the Collector or not, of the true area and value of the land, and the

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apportionment of the compensation among the persons interested. Section 12(2) is important. It makes it obligatory on the Collector to give immediate notice of his award to such of the persons interested as are not present personally or by their representatives when the award is made. It is common ground that no such notice was given by respondent 1 to the appellant. That briefly is the scheme of the relevant provisions of Part II of the Act which deals with acquisition.

Part III which deals with reference to Court and procedure thereon opens with section 18. Section 18 (1) provides that any person interested who has not accepted the award may, by written application to the Collector, require that the matter be referred by him for determination of the Court, *inter alia*, whether the amount of compensation is adequate or not. It is under this provision that the appellant made an application from which the present appeal arises. Section 18(2) requires that the application shall state the grounds on which objection to the award is taken. These grounds have been stated by the appellant in his application. The proviso to section 18 deals with the question of limitation. It prescribes that every such application shall be made (*a*) if the person making it was present or represented before the Collector at the time when he made his award within six weeks from the date of the Collector's award; (*b*) in other cases within six weeks of the receipt of the notice from the Collector under section 12(2), or within six months from the date of the Collector's award whichever shall first expire. The appellant's case falls under the latter part of clause (*b*) of the proviso. It has been held by the Allahabad High Court that since the application made by the appellant before respondent 1 was made beyond six months from the date of the award in question it was beyond time. The view taken by the

High Court proceeds on the literal construction of the relevant clause. As we have already seen the award was signed and delivered in his office by respondent 1 on 25th March, 1951, and the application by the appellant was made under section 18 on 24th February, 1953. It has been held that the effect of the relevant clause is that the application made by the appellant is plainly beyond the six months permitted by the said clause and so respondent 1 was right in rejecting it as barred by time. The question which arises for our decision is whether this literal and mechanical way of construing the relevant clause is justified in law. It is obvious that the effect of this construction is that if a person does not know about the making of the award and is himself not to blame for not knowing about the award his right to make an application under section 18 may in many cases be rendered ineffective. If the effect of the relevant provision unambiguously is as held by the High Court the unfortunate consequence which may flow from it may not have a material or a decisive bearing. If, on the other hand, it is possible reasonably to construe the said provision so as to avoid such a consequence it would be legitimate for the Court to do so. We must therefore enquire whether the relevant provision is capable of the construction for which the appellant contends, and that naturally raises the question as to what is the meaning of the expression "the day of the Collector's award".

In dealing with this question it is relevant to bear in mind the legal character of the award made by the Collector under section 12. In a sense it is a decision of the Collector reached by him after holding an enquiry as prescribed by the Act. It is a decision, *inter alia*, in respect of the amount of compensation which should be paid to the person interested in the property acquired; but legally the award cannot be treated as

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a decision; it is in law an offer or tender of the compensation determined by the Collector to the owner of the property under acquisition. If the owner accepts the offer no further proceeding is required to be taken; the amount is paid and compensation proceedings are concluded. If, however, the owner does not accept the offer section 18 gives him the statutory right of having the question determined by Court, and it is the amount of compensation which the Court may determine that would bind both the owner and the Collector. In that case it is on the amount thus determined judicially that the acquisition proceedings would be concluded. It is because of this nature of the award that the award can be appropriately described as a tender or offer made by the Collector on behalf of the Government to the owner of the property for his acceptance. In *Ezra* v. *The Secretary of State* (1) it has been held that "the meaning to be attached to the word "award" under section 11 and its nature and effect must be arrived at not from the mere use of the same expression in both instances but from the examination of the provisions of the law relating to the Collector's proceedings culminating in the award. The consideration to which we have referred satisfy us that the Collector acts in the matter of the enquiry and the valuation of the land only as an agent of the Government and not as a judicial officer; and that consequently, although the Government is bound by his proceedings, the persons interested are not concluded by his finding regarding the value of the land or the compensation to be awarded." Then the High Court has added that such tender once made is binding on the Government and the Government cannot require that the value fixed by its own officer acting on its behalf should be open to question at its own instance before the Civil Court. The said case was taken before the Privy Council in *Ezra* v.

(1) (1903) I.L.R. 30 Cal. 36, 86.

Secretary of State for India (1), and their Lordships have expressly approved of the observations made by the High Court to which we have just referred. Therefore, if the award made by the Collector is in law no more than an offer made on behalf of the Government to the owner of the property then the making of the award as properly understood must involve the communication of the offer to the party concerned. That is the normal requirement under the contract law and its applicability to cases of award made under the Act cannot be reasonably excluded. Thus considered the date of the award cannot be determined solely by reference to the time when the award is signed by the Collector or delivered by him in his office; it must involve the consideration of the question as to when it was known to the party concerned either actually or constructively. If that be the true position then the literal and mechanical construction of the words "the date of the award" occurring in the relevant section would not be appropriate.

There is yet another point which leads to the same conclusion. If the award is treated as an administrative decision taken by the Collector in the matter of the valuation of the property sought to be acquired it is clear that the said decision ultimately affects the rights of the owner of the property and in that sense, like all decisions which affect persons, it is essentially fair and just that the said decision should be communicated to the said party. The knowledge of the party affected by such a decision, either actual or constructive, is an essential element which must be satisfied before the decision can be brought into force. Thus considered the making of the award cannot consist merely in the physical act of writing the award or signing it or even filing it in the office of the Collector; it must involve the communication of the said award to the

(1) (1905) I.L.R. 32 Cal. 605

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party concerned either actually or constructively. If the award is pronounced in the presence of the party whose rights are affected by it it can be said to be made when pronounced. If the date for the pronouncement of the award is communicated to the party and it is accordingly pronounced on the date previously announced the award is said to be communicated to the said party even if the said party is not actually present on the date of its pronouncement. Similarly if without notice of the date of its pronouncement an award is pronounced and a party is not present the award can be said to be made when it is communicated to the party later. The knowledge of the party affected by the award, either actual or constructive, being an essential requirement of fairplay and natural justice the expression "the date of the award" used in the proviso must mean the date when the award is either communicated to the party or is known by him either actually or constructively. In our opinion, therefore, it would be unreasonable to construe the words "from the date of the Collector's award" used in the proviso to section 18 in a literal or mechanical way.

In this connection it is material to recall the fact that under section 12(2) it is obligatory on the Collector to give immediate notice of the award to the persons interested as are not present personally or by their representatives when the award is made. This requirement itself postulates the necessity of the communication of the award to the party concerned. The Legislature recognised that the making of the award under section 11 followed by its filing under section 12(1) would not meet the requirements of justice before bringing the award into force. It thought that the communication of the award to the party concerned was also necessary, and so by the use of the mandatory words an obligation is placed on the Collector to communicate the award immediately to the person concerned. It is significant

that the section requires the Collector to give notice of the award immediately after making it. This provision lends support to the view which we have taken about the construction of the expression "from the date of the Collector's award" in the proviso to section 18. It is because communication of the order is regarded by the Legislature as necessary that section 12(2) has imposed an obligation on the Collector and if the relevant clause in the proviso is read in the light of this statutory requirement it tends to show that the literal and mechanical construction of the said clause would be wholly inappropriate. It would indeed be a very curious result that the failure of the Collector to discharge his obligation under section 12(2) should directly tend to make ineffective the right of the party to make an application under section 18, and this result could not possibly have been intended by the Legislature.

It may now be convenient to refer to some judicial decisions bearing on this point. In *Macconald* v. *The Secretary of State for India in Council* (1), RATTIGAN and SHAH DIN, JJ., held that under the proviso to section 18 until an award is announced or communicated to the parties concerned it cannot be said to be legally made. An award under the Act, it was observed in the judgment, is in the nature of a tender and obviously no tender can be made unless it is brought to the knowledge of the person to whom it is made. The learned Judges observed that this proposition seemed to them to be self-evident. The same view has been expressed by the Oudh Judicial Commissioner in *Hari Das Pal* v. *The Municipal Board, Lucknow* (2).

On the other hand, in *Jehangir Bomanji* v. *G. D. Gaikwad* (3) the Bombay High Court has taken the view that the element of notice is only an essential

(1) (1905) 4 I.C. 914. (2) (1914) 28 I.C. 652.
(3) A.I.R. 1954 Bom. 419.

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ingredient of the first part of clause (*b*) of the proviso to section 18 which prescribes the period of limitation as six weeks from the date of the receipt of the notice from the Collector, not of the second part which prescribes the maximum period of six months from the date of the Collector's award in absolute terms. According to that decision, as far as the limitation under the latter part is concerned it runs from the date of the award and the date of the award has nothing whatever to do with the notice which the Collector has to give under section 12(2). In our opinion this decision is based on a misconstruction of the relevant clause in the proviso to section 18. The same comment falls to be made in regard to the decision of the Kerala High Court in *State of Travancore-Cochin* v. *Navayani Amma Ponnamma* (1).

It may, however, be pertinent to point out that the Bombay High Court has taken a somewhat different view in dealing with the effect of the provision as to limitation prescribed by section 33-A (2) of the Indian Income Tax Act. This provision prescribes limitation for an application by an assessee for the revision of the specified class of orders, and it says that such an application should be made within one year from the date of the order. It is significant that while providing for a similar period of limitation section 33(1) specifically lays down that the limitation of sixty days therein prescribed is to be calculated from the date on which the order in question is communicated to the assessee. In other words, in prescribing limitation section 33(1) expressly provides for the commencement of the period from the date of the communication of the order, whereas section 33-A (2) does not refer to any such communication; and naturally the argument was that communication was irrelevant under section 33-A (2) and limitation would commence as from the making of

(1) A.I.R. 1958 Ker. 272.

the order without reference to its communication. This argument was rejected by the Bombay High Court and it was held that it would be a reasonable interpretation to hold that the making of the order implies notice of the said order, either actual or constructive, to the party affected by it. It would not be easy to reconcile this decision and particularly the reasons given in its support with the decision of the same High Court in the case of *Jehangir Bomanji* (1). The relevant clause under section 33-A (2) of the Indian Income Tax Act has also been similarly construed by the Madras High Court in *O. A. O. A. M. Muthia Chettiar* v. *The Commissioner of Income-tax, Madras* (2). "If a person is given a right to resort to a remedy to get rid of an adverse order within a prescribed time", observed RAJAMANNAR, C. J., "limitation should not be computed from a date earlier than that on which the party aggrieved actually knew of the order or had an opportunity of knowing the order and therefore must be presumed to have the knowledge of the order." In other words the Madras High Court has taken the view that the omission to use the words "from the date of communication" in section 33-A (2) does not mean that limitation can start to run against a party even before the party either knew or should have known about the said order. In our opinion this conclusion is obviously right.

A similar question arose before the Madras High Court in *Annamalai Chetti* v. *Col. J. G. Closte* (3). Section 25 of the Madras Boundary Act XXVIII of 1860 limited the time within which a suit may be brought to set aside the decision of the settlement officer to two months from the date of the award, and so the question arose as to when the time would begin to run. The High Court held that the time can begin to run only from the date on which the decision is communicated

(1) A.I.R. 1954 Bom. 419. (2) I.L.R. [1951] Mad. 815.
(3) (1883) I.L.R. 6 Mad. 189.

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to the parties. "If there was any decision at all in the sense of the Act," says the judgment, "it could not date earlier than the date of the communication of it to the parties; otherwise they might be barred of their right of appeal without any knowledge of the decision having been passed". Adopting the same principle a similar construction has been placed by the Madras High Court in *K. V. E. Swaminathan* alias *Chidambaram Pillai* v. *Letchmanan Chettiar* (1) on the limitation provisions contained in sections 73(1) and 77(1) of the Indian Registration Act XVI of 1908. It was held that in a case where an order was not passed in the presence of the parties or after notice to them of the date when the order would be passed the expression "within thirty days after the making of the order" used in the said sections means within thirty days after the date on which the communication of the order reached the parties affected by it. These decisions show that where the rights of a person are affected by any order and limitation is prescribed for the enforcement of the remedy by the person aggrieved against the said order by reference to the making of the said order, the making of the order must mean either actual or constructive communication of the said order to the party concerned. Therefore, we are satisfied that the High Court of Allahabad was in error in coming to the conclusion that the application made by the appellant in the present proceedings was barred under the proviso to section 18 of the Act.

In the result we allow the appeals, set aside the orders passed by MOOTHAM, C. J., and CHATURVEDI, J., and restore those of MEHROTRA, J. In the circumstances of this case there would be no order as to costs.

Appeals allowed.

(1) (1930) I.L.R. 53 Mad. 491.

SUPREME COURT

APPELLATE CRIMINAL

1962
April, 5

Before the Hon'ble the Chief Justice Mr. Bhuvaneshwar Prasad Sinha, the Hon'ble Mr. Justice Das, the Hon'ble Mr. Justice Sarkar, the Hon'ble Mr. Justice Das Gupta, and the Hon'ble Mr. Justice Ayyangar.

FIDA HUSAIN

v.

STATE OF UTTAR PRADESH

[*ON APPEAL FROM THE HIGH COURT AT ALLAHABAD*]

Foreigner's overstay in India—*Requisities of conviction for,—Definition of a foreigner, in* 1953—*Foreigners Act,* 1946, *ss.* 2(*a*), 3 *and* 14—*Foreigners Order,* 1948, *para.* 7—*British Nationality and Status of Aliens Act* (4 *and* 5 *Geo.* 5, *Ch.* 17) *s.* 1(1) (*a*).

No one can be convicted for a breach of paragraph 7 of the Foreigners Order unless he was a foreigner at the time of his entry in India. A natural born British subject entering India in 1953 on a passport granted by the Government of Pakistan did not fall within the then definition of a 'foreigner' and was, therefore, not liable to conviction for overstaying in India beyond the period allowed by the visa.

Criminal Appeal no. 129 of 1960, from the judgment and order, dated the 9th March, 1960 of the Allahabad High Court in Criminal Revision no. 697 of 1959.

The facts appear in the judgment.

Naunit Lal, Advocate for the appellant.

G. C. Mathur and *C. P. Lal,* Advocates for the respondent.

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The following judgment of the Court was delivered by—

SARKAR, J.:—The appellant who had earlier left India, returned on a passport granted by the Government of Pakistan on 16th May, 1953. He had a visa endorsed on his passport by the Indian authorities permitting him to stay in India for three months and this permission was later extended up to 15th November, 1953. He did not, however, return to Pakistan within that date upon which he was convicted under section 14 of the Foreigners Act, 1946, by a Sub-Divisional Magistrate on 14th March, 1959, and sentenced to rigorous imprisonment for one year. His appeal to a Sessions Judge was dismissed and the High Court at Allahabad, on being moved in revision, refused to interfere with the order of the Sessions Judge. This appeal is against the judgment of the High Court.

The appellant had been convicted for breach of paragraph 7 of the Foreigners Order of 1948, issued under section 3 of the Foreigners Act. That paragraph requires that every foreigner entering India on the authority of a visa issued in pursuance of the Indian Passport Act, 1920, shall obtain from the appropriate authority a permit indicating the period during which he is authorised to remain in India and shall, unless that period is extended, depart from India before its expiry. As earlier stated, the visa on the appellant's passport showed that he had permission to stay in India till 15th November, 1953, but he stayed on after that date. Hence the prosecution.

It is contended on behalf of the appellant that he could not be convicted of a breach of paragraph 7 of the Foreigners Order for that paragraph applies to a "foreigner" entering India on the authority of a visa issued in pursuance of the Indian Passport Act and overstaying the period for which he is permitted to stay in

India. It is contended that the foreigner contemplated in this paragraph is a person who was a foreigner on the date of his entry into India. The appellant says that on that date he was not a foreigner and, therefore the provisions of the paragraph do not apply to him. This contention of the appellant is plainly correct. The paragraph contemplates a foreigner entering India, and therefore, a person who at the date of the entry was a foreigner.

Now, the word "foreigner" in paragraph 7 has the same meaning as that word has in the Foreigners Act. The word "foreigner" is defined in that Act in section 2(*a*). That definition has changed from time to time, but we are concerned with the definition as it stood in 1953 when the appellant entered India, which was in these terms:

> "foreigner" means a person who—
>
> (1) is not a natural-born British subject as defined in sub-sections (1) and (2) of section 1 of the British Nationality and Status of Aliens Act, 1914, or
>
> (2) has not been granted a certificate of naturalisation as a British subject under any law for the time being in force in British India, or
>
> (3) is not a citizen of India.

The appellant's contention is that he was not a foreigner because he came within clause (1) of the definition as he was a natural-born British subject within section 1(1), (*a*) of the British Nationality and Status of Aliens Act, 1914. Now that provision is in these terms:

> *Section* 1. (1) The following persons shall be deemed to be natural-born British subjects, namely.—
>
> (*a*) any person born within His Majesty's Dominion and allegiance.

That the appellant was born at Allahabad at a time when it was within his Britannic Majesty's Dominion is not

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in dispute. That being so, we think that it must be held that at the date of his entry into India the appellant was a natural-born British subject and, therefore, not a foreigner. He could not have committed a breach of paragraph 7 of the Foreigners Order.

In the result we allow the appeal and set aside the conviction of the appellant and sentence passed on him.

Before leaving this case we think it right to make a few more observations. The definition of a foreigner in the Foreigners Act was amended with effect from 19th January, 1957, by Act 11 of 1957. The definition since that date is as follows: " 'foreigner' means a person who is not a citizen of India". Under section 3(2), (c) of the Foreigners Act, the Central Government has power to provide by order made by it that a foreigner shall not remain in India. We wish to make it clear that we have said nothing as to the effect of the amended definition of "foreigner" on the status of the appellant. No question as to the effect of the amended definition on the appellant's status fell for our decision in this case for we were only concerned with his status in 1953. We would also point out that no order appears to have been made concerning the appellant under section 3(2) (c) and we are not to be understood as deciding any question as to whether such an order could or could not have been made against the appellant.

Appeal allowed.

SUPREME COURT

APPELLATE CIVIL

Before the Hon'ble Mr. Justice Subha Rao, the Hon'ble Mr. Justice Dayal and the Hon'ble Mr. Justice Mudholkar.

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April, 11

SETH HIRA LAL PATNI (APPELLANT)

v.

SETH LOONKARAN SETHIYA AND OTHERS (RESPONDENTS)

[*ON APPEAL FROM THE HIGH COURT AT ALLAHABAD*]

Receiver—*Duration of office of, in a suit—Lease by receiver—Summary jurisdiction of court to evict the lessee—Code of Civil Procedure,* 1908, *O. XL r.* 1.

There is no express provision in the Code of Civil Procedure with regard to the time when and the mode in which the office of receivership comes to an end. A review of the relevant texts leads to the following summary of the law on this subject: (1) If a receiver is appointed in a suit until judgment, the appointment is brought to an end by judgment in the suit, (2) If a receiver is appointed in a suit, without his tenure being expressly defined, he will continue to be receiver till he is discharged, (3) But after the final disposal of the suit as between parties to the litigation the receiver's functions are terminated, he would still be answerable to the Court as its officer till he is finally discharged, (4) The court has ample power to continue its receiver after the final decree if the exigencies of the case so require.

(*Obiter*) The relevant decisions of the High Court in India seem to converge to the view that a court cannot evict a lessee from a receiver whether he is a party to the suit or not, in exercise of its summary jurisdiction unless the lease expressly conferred a right of re-entry under the lease deed on the receiver.

Case-law discussed.

Civil Appeal no. 110 of 1961 from the judgment and order, dated the 14th October, 1960, of the Allahabad High Court in First Appeal from Order No. 41 of 1959.

The facts appear in the judgment.

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SUTTE HIRA LAL PATNI v. SETH LOONKARAN SETHIYA

C. B. Agarwala, Senior Advocate (*Rameshwar Nath, S. N. Andley, J. B. Dadachanji* and *P. L. Vohra*, Advocates of Messrs. Rajinder Narain & Co. with him) for the appellant.

K. R. Chaudhuri, A. K. Kirty and *Ratna Rão*, Advocates for the respondent no. 1.

S. P. Sinha, Senior Advocate (*M. I. Khwaja*, Advocate, with him) for the respondents nos. 2, 3 and 4.

H. N. Sanyal, Additional Solicitor-General of India.

(*G. C. Mathur*, Advocate with him) for the respondent no. 5.

Nanmit Lal, Advocate, for respondent no. 7.

The following Judgment of the Court was delivered by—

SUBBA RAO, J.:—This appeal by special leave is directed against the judgment dated 14th October, 1960, of the High Court of Judicature at Allahabad confirming the order passed by the Civil Judge, Agra, directing the Official Receiver to take possession of the property of the appellant.

This case illustrates how the enforcement of an interlocutory order appointing a Receiver made in the interest of all the parties concerned could be obstructed and the object of the order itself be defeated by dilatory tactics adopted by one party or other.

At Agra, there were three spinning mills and one flour mill, all of which together were described as the Johns Mills; and, originally, the John family or their predecessors were the owners of all these mills. At the time the present proceedings were initiated, other persons had acquired interest therein. The following persons were the joint owners of the mills: (1) Hiralal Patni, the appellant, and Munni Lal Mehra—19/40th share; (2) Gambhirmal Pandia Private Ltd.—8/40th

share! (3) Messrs. John & Co.—11/40th share; and (4) J. E. John—2/40th share. Seth Loonkaran Sethiya, respondent no. 1, advanced large amounts to Messrs. John & Co. on the security of its business assets and stocks. On 18th April, 1949, the said Sethiya filed O. S. no. 76 of 1949 in the Court of the Civil Judge, Agra, against John & Co. for the recovery of the amount due to him by sale of the assets of the said company. To that suit the partners of Messrs. John & Co., for convenience described as "defendants 1st set", and the partners of Messrs. Johns Jain & Co., who were for convenience described as "defendants 2nd set", were made parties. Pending the suit, the said Sethiya filed an application under O. XL, r. 1, Code of Civil Procedure, for the appointment of a Receiver. By an order dated 21st May, 1949, the learned Civil Judge appointed two joint Receivers and directed them to run the three spinning mills. Hiralal Patni filed an appeal against that order to the High Court at Allahabad, and the said Court by its order dated 22nd August, 1949, modified the order of the Civil Judge confining the order of appointment of Receivers only to the share of Messrs. John & Co. in John Jain Mehra & Co. Loonkaran Sethiya made another application in the Court of the Civil Judge for the appointment of a Receiver for the property of Hiralal Patni and the learned Civil Judge by his order dated 1st December, 1951, directed the Receivers to take possession of the appellant's share in the mills also. Against this order an appeal was preferred to the High Court and the operation of the said order was stayed pending the disposal of the appeal. On 5th April, 1954, the Civil Judge passed a preliminary decree against the defendants therein directing them to deposit the decree amount in court within the prescribed time, and in default the plaintiff was given a right to apply for a final decree for sale of the business assets of the defendants. The decree also gave a right to apply for a personal

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decree in case the sale proceeds were not sufficient to discharge the decree. The preliminary decree directed that the Receivers should continue on the property until discharged. Hiralal Patni preferred an appeal to the High Court against the said preliminary decree and applied for interim stay of its operation. On 23rd August, 1955, the High Court discharged the Receivers appointed by the learned Civil Judge, and appointed another Receiver in their place. On 25th March, 1955, the learned Civil Judge prepared a scheme for running the mills, and the parties preferred appeals against that scheme to the High Court. The said appeals were compromised and under the terms of the compromise the parties agreed to take different mills on lease for a period of three years from the Receiver. On 14th January, 1956, the Receiver executed a lease in respect of the flour mill in favour of Hira Lal Patni for a period of three years. Under the lease deed it was agreed that he should deliver the demised premises to the Receiver upon the expiry of the term. In due course, on 14th March, 1956, a final decree was made in the suit for the sale of the properties, but the final decree was silent in regard to the Receiver appointed earlier. On 29th September, 1958, Hira Lal Patni applied to the High Court for extension of the lease by three years. On 16th January, 1959, the High Court rejected the application on the ground that the lease was only stop-gap arrangement and that it was for the Receiver to make a fresh arrangement for the future under the supervision and directions of the Civil Judge, Agra. On 17th January, 1959, the Receiver applied to the Civil Judge for instructions whether he should proceed at once to dispossess the appellant. On notice, Hira Lal Patni raised various objections and claimed that he was entitled to remain in possession of the property as its owner. The learned Civil Judge disallowed his objections and held that the Receiver derived his authority from the preliminary

decree, and directed the Receiver to lease out the said flour mill by auction for a period of two years. Pursuant to that order, an auction was held, and the appellant was the highest bidder, and he paid the lease amount and executed a formal lease deed. Not satisfied with the order of the Civil Judge, Hira Lal Patni preferred an appeal to the High Court. The High Court in an elaborate judgment considered the contentions raised on behalf of Hira Lal Patni and dismissed the appeal. Hence the present appeal.

Learned counsel for the appellant raised before us the following three contentions, which the appellant unsuccessfully raised before the High Court as well as before the Civil Judge: (1) On a true construction of the relevant orders the Receiver has no power to dispossess the appellant in such a way as to prevent him from working his flour mill. (2) After the passing of the final decree, though the Receiver may continue for the purpose of accounting and discharge of debts, he cannot exercise any powers in respect of the rights of the parties. And (3) in any view, as the appellant acquired a right under a lease deed and continued in possession after its expiry, he could be dispossessed only by a suit and not by a summary procedure.

The first question turns upon the construction of the relevant orders. The Civil Judge appointed two joint Receivers by an order dated 21st May, 1949. It is not necessary to consider the said order as the final order that governed the rights of the Receiver and the parties was that made by the High Court on appeal on 22nd August, 1949. After considering the contentions of the parties, the High Court came to the conclusion that a Receiver should be appointed to be in charge of the entire property, immovable and movable, of the defendants 1st set for its protection and preservation. The order of the High Court described the John family as

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defendants 1st set to the suit, and defendant 5, Hira Lal Patni, defendant 6, Munnilal Mehra, and Messrs. John Jain Mehra & Co. as defendants 2nd set. This order was confined only to the properties of defendants 1st set. The High Court further proceeded to state:

> "In the finance agreement in plaintiff's favour, the plaintiff was not given any right to enter into possession on non-payment or to run the mill. . . . There being no right given to the plaintiff to enter into possession and manage the mills or to have a receiver appointed, a receiver can be appointed only under Order XL, rule 1, of the Code of Civil Procedure."

Adverting to the contention raised by the defendants that a Receiver could not be appointed to run the mills, the High Court observed:

> "In view of the order that we propose to pass today we do not want to go into that question. In case the mills are not run under the order of the Collector under the United Provinces Industrial Disputes Act, or by the partners we propose to give the parties permission to move this court. In case we decide to appoint a receiver to run the mills we shall then consider whether a receiver can or cannot be appointed for the purpose of running the mills."

Then the High Court stated:

> "We have already set out the circumstances which in our opinion make it necessary that a receiver should be appointed to take charge of the property of defendants first set whether under the finance agreement of July, 1948, there was a charge created on the property, movable and immovable, or not. The Receiver will not interfere with the running of the mills except under express orders of the court and to the extent when it becomes necessary by reason of the value of the security being jeopardized by any action of the defendants."

Then the High Court pointed out that the Collector had the power under section 8 of the Industrial Disputes Act to make arrangements for the running of the mills. Finally the High Court observed:

> "It may be necessary from time to time to give directions to the receiver. The parties may also want portions of this order to be clarified or other directions obtained. The lower court may give such directions to the receiver or to the parties as it may consider just and proper. In case further directions are necessary or the receiver or the parties are not satisfied with the directions given they may move this court for further directions."

Shortly stated, the High Court confirmed the order of the Civil Judge appointing the Receivers and directed them to take charge of the properties of defendants 1st set. The High Court expressly prohibited the Receivers from interfering with the running of the mills except under express orders of the court, for at that time it did not think it necessary to direct the Receivers to do so. It may be recalled that the Receivers were not appointed for the flour mill of the appellant, Hira Lal Patni, as he was one of the defendants belonging to the 2nd set. Learned counsel for the appellant contends that this order did not put the mills in the possession of the Receivers and that the Receivers were given only a supervisory control over the share of the defendants 1st set in the mills. Whatever terminology may have been used, the fact remains that the Receivers were put in charge of the entire property of defendants 1st set, which includes their share in the mills, though it was equally made clear that the Receivers could not directly run the mills without further directions in that regard.

The Civil Judge by his order dated 1st December, 1951, directed the Receivers to take possession of the

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share of defendants 2nd set also. The operative portion of that order reads:

> "For all these reasons I have come to the conclusion that it is just and convenient that a receiver should be appointed over the share of the defendant 2nd set, and I order that the present receivers who are in possession of the defendant 1st set share should also be appointed receivers over the share of the defendant 2nd set. As for the prayer allowing the receivers to run the mills the question of running of the mills is already before the High Court as is shown by the compromise dated 8th September, 1950. It is not known what has happened after this compromise. The receivers are directed to seek the direction of the Hon'ble High Court on the question of the running of the mills so that there may be no chance of conflicting of orders passed by this court and the Hon'ble High Court, on this matter. The receivers will not interfere with the running of the mills except under express orders of this court and to the extent when it becomes necessary by reason of the value of the security being jeopardized by any action of the persons running the Mills. The receivers are appointed over the share of the defendants 2nd set only, for the purpose of preservation and protection and realization of the rent."

This order runs on the same lines indicated by the High Court in its earlier order in respect of the share of defendants 1st set. What is to be noted is that under this order the Receivers were prohibited from running the mills except under the specific orders of the said court or of the High Court. On 5th April, 1954, a preliminary decree was made in the suit, and under that decree the defendants were directed to deposit a sum of Rs.18,00,152 in court within the prescribed date and

in default the plaintiff was given a right to apply for a final decree for the sale of the assets of the spinning mills. There was a further direction that in case the net sale proceeds of the said property were found insufficient to satisfy the plaintiff's claim, the plaintiff would get a personal decree against defendants 1st set and defendants 2nd set for the balance of his claim. The Receivers were directed to continue on the property until discharged. Under the preliminary decree, the plaintiff became entitled not only to the sale of the assets of the spinning mills but also to a personal decree against all the defendants for recovering any balance that might still be due to him after the sale of the said properties. What is more, the Receivers were expressly directed to continue till they were discharged, and as the decree did not specify the powers of the Receivers, it must be held that they continued to exercise such powers as they had under the previous orders of the courts dated 22nd August, 1949 and 1st December, 1951.

On 25th March, 1955, the learned Civil Judge, Agra, prepared a scheme for the running of the three spinning mills, and the parties preferred two appeals to the High Court against the scheme. On 22nd July, 1955, a compromise was effected between the parties in the said two appeals and the appeals were disposed of in terms of the compromise by order of the High Court dated 23rd August, 1955. As the terms of this order are rather important in the context of the contentions raised before us, we would read the relevant portions thereof:

> *Clause* 1. That the aforesaid parties have without prejudice to their rights and litigation between them have after deliberate consideration and as a special effort to make arrangements for running the Johns Mill have decided that the three Spinning Mills and Flour Mill situate in Agra should be run

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by the parties in accordance with the terms and conditions set forth below.

* * * *

(vi) That the lease shall be granted by the receiver on terms and conditions approved by the Court.

* * * *

(ix) If any lessee shall fail to run the Mill after delivery of possession or pay the lease money or fail to carry out the arrangements arrived at between the parties for a period of three months, the receiver shall take possession of the Mills and with the permission of the court shall lease out that particular mill to any of the parties excepting the party in default who may offer the highest bid in accordance with the orders passed by the Civil Judge in this matter.

Clause 4. .....

The arrangement embodied in this document is only for the purpose of working the mills by the petitioners. Nothing contained in this document will affect the rights and obligation of the parties which are or may be the subject-matter of suit No. 76 of 1949 or in any litigation between the parties and notwithstanding anything contained herein but subject however to the express provision in the preceding paragraph of this clause it will be open to the petitioners to seek their remedies in any manner provided by law, and without prejudice to the rights of the parties to obtain a stay order from the Hon'ble High Court or any other Court."

What is the effect of this order? Learned counsel for the appellant contends that this order embodies an internal arrangement between the defendants for running

the mills and that it does not in any way enlarge the scope of the orders dated 22nd August, 1949, and 1st December, 1951, under which the Receivers were appointed. We do not think that the scope of the orders is so limited. The combined effect of the said earlier orders was that the Receivers should take possession of the entire properties of the two sets of defendants. But the Receivers were not given the power to run the mills without specific directions to that effect by the court. The Civil Judge by his order dated 25th March, 1955, evolved a scheme for running the mills, and by that order he laid down the conditions and directed the Receivers to advertise calling for applications from persons, including the Government, who were willing to run the mills. This order was only confined to the three spinning mills. The compromise order in the appeals covered also the flour mill. Though different mills were to be run by different defendants by obtaining lease deeds, that was only a mode evolved for running the mills under the supervision of the court. Under the compromise, the leases were to be executed in favour of the Receiver. It also provided that in case the lessees did not carry out the terms of the lease, the Receiver should take possession of the mill in respect of which default was committed and, with the permission of the court, should lease out the mill to any of the defendants other than the defaulting party. The clauses saving the rights of the parties obviously refer to their rights which were the subject-matter of the suit and they could not have any reference to the terms agreed upon under the compromise order. Under the compromise order, the courts, though by consent, gave directions for running the mills which they left out for future consideration in their earlier orders. The result was that under the earlier orders, all the properties of the defendants were put in possession of the Receivers, and under the com-

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promise order, the Receiver was directed to run the mills under the agreed scheme.

Pursuant to the terms of the compromise order, on 14th January, 1956, the Receiver executed a lease in favour of the appellant in respect of the flour mill for a period of three years, and under that lease deed the appellant got possession from the Receiver and agreed "To yield up all the demised premises with all fixture, improvement and replacements thereto in good and tenantable repair and condition in accordance with the lease covenants in that behalf herein contained upon the expiry of the term hereby created or the sooner determination of these presents as herein provided". Whatever ambiguity there may have been, this lease deed dispels it, for under the lease deed the appellant admits the legal possession of the Receiver, takes a lease under him, and agrees to put him back in possession after the expiry of the lease. On 29th September, 1958, the appellant again applied to the court for extension of the lease for three more years, thereby accepting his possession under the Receiver, though the court on 16th January, 1959, dismissed that application on the ground that the lease was only a stopgap arrangement and that it was for the Receiver to make a fresh arrangement for the future under the supervision and directions of the Civil Judge under whose preliminary decree he derived authority. It is manifest from the aforesaid orders that the Receiver was put in possession of the entire property of the defendants, that he was not empowered to run the mills personally, that by subsequent orders he was directed to lease out the mills to the parties in the manner prescribed and that under the final order he was to take over possession and make other arrangements for running the mills. In the premises, we find it very difficult to accept the argument of learned counsel that the Receiver was not put in possession of the mills, but the mills continued to be in the

possession of the defendants. We hold on a construction of the relevant orders that the flour mill of the appellant was also put in the possession of the Receiver and that the appellant was running the said mill under the compromise formula.

The second contention of learned counsel for the appellant is that the Receiver appointed in the suit ceased to be a Receiver *qua* the rights of the parties when the final decree was made by the Court. This contention leads us to the consideration of the question whether a Receiver appointed in a suit ceases to be such automatically on the termination of the suit. Neither section 51(*d*) nor order XL of the Code of Civil Procedure prescribes for the termination of the office of receivership. We must, therefore, look for the solution elsewhere. Some of the authoritative text-books on receivers may usefully be consulted in this connection.

In Halsbury's Laws of England, 3rd Edn., Vol. 32 (Lord Simonds), at p. 386 under the heading "Duration of appointment by court", the following statement occurs:

> "When a receiver is appointed for a limited time, as in the case of interim orders, his office determines on the expiration of that time without any further order of the court, and if the appointment is 'until judgment or further order' it is brought to an end by the judgment in the action. The judgment may provide for the continuance of the receiver, but this is regarded as a new appointment. If a further order of the court, though silent as to the receivership, is inconsistent with a continuance of the receiver, it may operate as a discharge.
>
> When a receiver has been appointed on an interlocutory application without any limit of time, it is not necessary to provide for the continuance of his appointment in the final judgment. The

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silence of the judgment does not operate as a discharge of the receiver or determination of his powers. So, also the appointment of a receiver generally by the judgment in an administration action need not be continued by the order on further consideration."

In Kerr on Receivers, 12th Edn., in Chapter XII under the heading "Discharge of a Receiver", the legal position is explained thus:

> "The appointment of a receiver made previously to the judgment in an action will not be superseded by it, unless the receiver is appointed only until judgment or further order."

In High on the law of Receivers, 4th Edn., the following observations appear at p. 985:

> "The functions of a receiver usually terminate with the termination of the litigation in which he was appointed. And when the bill upon which the appointment was made is afterwards dismissed upon demurrer, the duties of the receiver cease as between the parties to the action. . . . And although as between the parties to the litigation his functions have terminated with the determination of the suit, he is still amenable to the court as its officer until he has complied with its directions as to the disposal of the funds which he has received during the course of his receivership. . . . But an order of discharge does not necessarily follow, in all cases, because of the determination of the suit, and the court may, upon sufficient cause shown, either discharge or continue the receiver, according to the exigencies of the case."

The learned author makes a further distinction at p. 986 between the following two classes of cases:

> "Since the final decree in the cause is generally decisive of the subject-matter in controversy, and

determines the right to the possession of the fund or property held by the receiver, it is usually the case that such decree supersedes the functions of the receiver, since there is then nothing further for him to act upon, although it would seem to be still necessary that a formal application be made for his discharge. But when the court by its decree does not attempt to decide the main question in controversy, and leaves the receiver's possession undisturbed, it cannot be held to have the effect of operating as a discharge, or of superseding his functions."

Woodroffe in "The Law Relating to Receivers in British India", 4th Edn., states at p. 22 thus:

"O. XL, r. 1(*a*) now expressly provides that a receiver may be appointed whether before or after decree. As long as the order appointing a receiver remains unreversed, and as long as the suit remains a *lis pendens*, the functions of the receiver continue, until he is discharged by order of the Court."

The law may briefly be stated thus: (1) If a receiver is appointed in a suit until judgment, the appointment is brought to an end by the judgment in the action. (2) If a receiver is appointed in a suit, without his tenure being expressly defined, he will continue to be receiver till he is discharged. (3) But, after the final disposal of the suit as between the parties to the litigation, the receiver's functions are terminated, he would still be answerable to the court as its officer till he is finally discharged. (4) The court has ample power to continue the receiver even after the final decree if the exigencies of the case so require.

Let us now apply the said principles to the facts of the instant case. The order appointing the Receivers did not expressly state that the Receivers' term would

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expire on the termination of the suit. Under the Preliminary decree the plaintiff became entitled to apply for the passing of the final decree for the sale of the property charged and also to get a personal decree against the defendants 1st set and 2nd set for the balance of his claim remaining due after the sale. The preliminary decree expressly directed the Receivers to continue until discharged. Pursuant to the preliminary decree, a final decree for sale of the said properties was made, but the said decree did not in any way modify the direction given in the preliminary decree in respect of the Receivers. The combined effect of the two decrees is that the final decree did not terminate the suit, for the plaintiff would still be entitled to get a personal decree in case the sale proceeds were not sufficient to pay off his dues. It cannot, therefore, be said that the suit has been finally disposed of. That apart, the preliminary decree in express terms directed the Receivers to continue till they were discharged. In the circumstances, we are definitely of the opinion that the Receivers continued by the preliminary decree are entitled to function in that capacity till they are discharged.

The third contention of learned counsel for the appellant raises the question whether in the circumstances of this case the Receiver could recover possession from the appellant only by instituting a regular suit against him for eviction. The facts germane to this contention may be briefly recapitulated. On 14th January, 1956, the appellant executed a lease deed in respect of the flour mill in favour of the Receiver and there was an express recital therein that the lessee would deliver possession to the Receiver of all the demised premises upon the expiry of the term of lease. The said lease was executed as a part of a compromise scheme for running the mills. The term of the lease had expired. Thereafter the court directed the Receiver to take possession of the property and auction the same to the highest bidder.

The question is whether under the circumstances a court can dispossess the appellant under a summary process or whether it could only do so by directing the Receiver to file a suit for eviction. The material provisions of Order XL of the Code of Civil Procedure read:

> *Rule* 1. (1) Where it appears to the Court to be just and convenient, the Court may by order—
>
> * * * *
>
> (*b*) remove any person from the possession or custody of the property;
>
> * * * *
>
> (*d*) confer upon the receiver all such powers, as to bringing and defending suits and for the realization, management, protection, preservation and improvement of the property, the collection of the rents and profits thereof,. . . .".
>
> (2) Nothing in this rule shall authorize the Court to remove from the possession or custody of property any person whom any party to the suit has not a present right so to remove.

Under this Order, a receiver is an officer or representative of the court and he functions under its directions. The court may, for the purpose of enabling the receiver to take possession and administer the property, by order, remove any person from the possession or custody of the property. Sub-r. (2) of rule 1 of the Order limits that power in the case of a person who is not a party to the suit, if the plaintiff has not a present right to remove him. But when a person is a party to the suit, the court can direct the receiver to remove him from the possession of the property even if the plaintiff has not a present right to remove him. In the present case, the appellant was a party to the suit and the court, through the Receiver took possession of the mill and thereafter the Receiver, during the course of the administration of

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the property, under a compromise arrangement for running the mills, leased out the flour mill to the appellant with an express condition that the appellant should redeliver the property to the Receiver on the expiry of the lease. Admittedly the term of the lease had expired, and the court directed the Receiver to take possession of the mill. The court, in our view, was legally competent to confer a power on the Receiver under Order XL., r. 1(1)(*d*), of the Code of Civil Procedure to recover the property from the appellant.

The decisions cited at the Bar are not of much relevance to the present case. *Krista Chandra Ghose* v. *Krista Sakha Ghose* (1) is a case where a lease was granted by a Receiver acting under an order of court and the possession of the property had been given to the lessee, and subsequently certain parties applied to the court for a declaration that the lease was invalid on the ground that it was obtained by collusion. There the court held that no summary order could be passed to set aside the lease and the proper remedy would be by a suit against the Receiver and also against the lessee. In that case the lessee, though he was a party to the suit, acquired a leasehold right under the lease deed and third parties, who offered a higher rent, sought to question the lease on the ground of collusion. Woodroffe, J., held that the dispute could only be decided in a properly instituted suit. The Rajasthan High Court in *Nanakchand* v. *Pannalal* (2) held that a Receiver could not recover the rent from a lessee in a summary order of the court, but should file a suit just like any other landlord. The Allahabad High Court in *Loonkaran* v. *I. N. John* (3), though it conceded that where a lease had been executed by the Receiver, the lessee may ordinarily be evicted from the demised property only by a regular suit, held that where after the expiry of the term of the

(1) (1908) I.L.R. 36 Cal. 52. (2) A.I.R. 1951 Raj. 152.
(3) A.I.R. 1961 All. 59.

lease granted by a Receiver, the sub-lessee in possession gave an undertaking to the court that he would vacate the premises in favour of the prospective lessee if no fresh lease was granted in his favour, the court has power to eject the sub-lessee in its summary jurisdiction. The learned Judge observed at p. 59 thus:

> "By giving an undertaking to the court that he would vacate the mill in favour of the prospective lessee and by bidding in the court-auction the appellant, in our view, submitted himself to the jurisdiction of the court. The appellant could therefore be ejected by summary process, instead of by a suit."

So too, the High Court of Travancore-Cochin in *Sivarajan* v. *Official Receiver, Quilon District* (1) held that where the period of the lease granted to the receiver had already expired and as per the express stipulation in the lease deed the lessee was bound to surrender possession of the property without raising any objection at all, the court could summarily evict him. The learned Judge made the following observations at p. 39:

> "Even though the lease deed stands in favour of the receiver the express undertaking given by the lessee for an unconditional surrender of the property is in favour of the court. . . . The summary enforcement of the undertaking thus taken by the court is only a step towards the discharge of the duties of the court in the management of the estate and it cannot be said that the court has lost its jurisdiction in that direction merely because the property has been in the possession of a lessee."

Further citation would be redundant. These and such decisions seem to hold that a court cannot evict a lessee from a receiver, whether he is a party to the suit or not, in exercise of its summary jurisdiction unless the lease

(1) I.L.R. 1958 T.C. 30.

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expressly conferred a right of re-entry under the lease deed on the receiver. It is not necessary to demarcate the boundaries of the summary jurisdiction of a court in managing an estate through a receiver, for in this case we are clearly of the opinion that the appellant was in possession of the mill under an agreed and integrated scheme for running the mills by the different partners, though he was put in possession under a document described as a lease deed. In effect the Receiver, during the course of the management, entrusted each mill to one of the partners so that the mills might be properly worked under experienced hands. The appellant expressly agreed to put the Receiver in possession of the mill after the expiry of three years. No question of deciding the conflicting claims of a lessee and a third party arises in this case; nor is the court called upon to pronounce on the vested rights of a lessee in conflict with those of the Receiver. But this is a simple case of a court in the course of its administration of the estate through the agency of a Receiver making a suitable provision for the running of the mills. As the agreed term had expired, the court, in our view, could certainly direct the appellant to put the mill in the possession of the Receiver.

Lastly it has been brought to our notice that an application for the discharge of the Receiver is pending in the lower court. Any observations that we have made in this judgment are not intended to affect the merits one way or other in the disposal of that application. That application will be disposed of in accordance with law.

In the result, the appeal fails and is dismissed with costs.

Appeal dismissed.

APPELLATE CIVIL

Before Mr. Justice Beg and Mr. Justice Kailash Prasad.

SARBJEET SINGH AND OTHERS (APPELLANTS)

v.

DEPUTY DIRECTOR OF CONSOLIDATION, JAUNPUR AND OTHERS (RESPONDENTS)

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April, 20

Limitation of filing a writ petition—*Filed under Art. 226 Constitution of India, if can be dismissed* in limine *as being beyond 90 days without considering cause of delay—If the time spent in obtaining a certified copy of judgment or order required and the 14 days time required for giving notice to the Standing Counsel to be excluded in computing limitation.*

The questions that arose for determination in the Special Appeal were whether the writ petition can be thrown out *in limine* merely on the ground that a period of 90 days has elapsed since the date of the impugned order without considering the cause of delay and whether in computing the period of limitation of 90 days which is the conventional period observed by this Court a party is legitimately entitled, to exclude the time spent in obtaining a certified copy of the impugned order or judgment to be filed and also to exclude 14 days time required for giving notice to the Standing Counsel under rules of the Court.

The Court after considering in detail, *Held*, (i) that it will be erroneous to throw out a writ petition *in limine* merely on the ground that a period of 90 days has elapsed since the date of the impugned order without considering the propriety, sufficiency or reasonableness of the situation and applying one's mind to other factors that are alleged to have intervened and caused delay;

(ii) that where the Court is of opinion that application could not be filed within the period of 90 days owing to circumstances which were beyond the control of the parties concerned or other reasons which in equity would incline the Court to condone the delay, there is no bar in law to the entertainment of such an application;

(iii) that a petitioner filing a writ petition should be considered entitled to exclude the period spent in obtaining a copy of the impugned judgment or order;

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(iv) that the party presenting the application would also be entitled to exclude the entire period of fourteen days (required for giving notice to Standing Counsel) excluding the day on which the notice was served;

(v) that even though the order of the learned single Judge was of a discretionary nature, the discretion vested in the Court was not exercised on recognised judicial and equitable principles.

Case-law discussed.

Special Appeal No. 255 of 1960, from the order of BROOME, J., dated 18th April, 1960 in Civil Misc. Writ no. 1058 of 1960.

The facts appear in the judgment.

A. P. Pandey, for the appellants.

The judgment of the Court was delivered by—

BEG, J.:—This appeal arises out of a writ petition which was directed against an order of the Deputy Director of Consolidation, Jaunpur, dated the 6th of January, 1960. The purpose of the writ petition was to have the said order quashed by this Court. In view of the fact that the sole argument that has been heard by us at this stage relates to the question of limitation, we propose to give in this judgment only those facts which are relevant to this particular point. It may be mentioned that all these facts are admitted by the parties before us, and are also borne out by the record of the case. The endorsement at the back of the certified copy of the order which was filed along with the writ petition shows that the application for a copy of the order sought to be impugned was given on the 9th of January, 1960, and that the copy was ready for delivery on the 13th of January, 1960. It would appear that under Chapter XXII, rule 1, sub-rule (4) of this Court, it was incumbent on the petitioner to serve a notice of the motion on certain parties mentioned therein. To comply with it a notice was served on behalf of the applicant on the Standing Counsel as required under Chapter XXII, rule 1, sub-rule (4) on the

7th of April, 1960. Thereafter, on the 18th of April, 1960 the present application was filed in the High Court. On the same day the learned Judge dismissed the said application *in limine* on the ground of limitation. He did not go into the merits of the case. The order passed by the learned Judge is a brief one, and runs as follows:

> "This application appears to be beyond time, the last impugned order having been passed on the 6th of January, 1960. More than 90 days have elapsed since then.
>
> The petition is accordingly rejected."

Dissatisfied with the said order the petitioners filed this special appeal. As more or less similar orders were passed by the same learned Judge in a large number of applications, all these applications were connected. All of them have been heard by us along with this application. We, however, propose to make this appeal the leading case, and to give our reasons exhaustively in our judgment in this case. Our judgment in this case will govern other cases in which we shall merely refer to this judgment for the reasons in support of our view in those cases.

Having heard learned counsel for the parties at considerable length, we are of opinion that this appeal should be allowed. Learned counsel appearing for the appellants has argued before us that the order of the learned single Judge dismissing the writ petition summarily on the ground of limitation without going into the merits of the case is an unjustifiable one. In this connection he has argued that the learned single Judge should have taken into consideration the fact that the petitioner had applied for a certified copy of the judgment, and that five days were taken in obtaining the said copy. He has further invited our attention to the fact that under the rules of this Court it was incumbent

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on the petitioner to serve a notice of the motion on the Standing Counsel, and that 14 clear days notice was necessary in that connection. If the period spent in obtaining a certified copy of the said order, and 14 days' time required for giving notice to the Standing Counsel under the Rules of this Court is taken into consideration, then the application would be admittedly within time. The learned counsel has, therefore, argued that the application should not have been dismissed summarily on the ground of limitation. The two questions, therefore, that have arisen before us are, first, whether in a case like the present a party is entitled to the exclusion of time spent in obtaining a certified copy of the order; and, secondly, whether a party is further entitled to the exclusion of 14days' time required for giving notice to the Standing Counsel under Chapter XXII, rule 1, sub-rule (4) of the High Court Rules.

Before, however, discussing these two questions we may make some general observations which may be helpful in the determination of the matter. The present application was filed under Art. 226 of the Constitution of India. The relief provided under this Article is a purely discretionary one. Neither in the Constitution of India, nor in the Rules framed by the High Court is there any provision prescribing any period of limitation for the filing of an application under Article 226 of the Constitution. Further, even after the coming into force of the Constitution of India, there has been no amendment of the Limitation Act for the purpose of providing any period of limitation for filing such applications. It appears to us that the reason why no such provision is made in the Constitution or under any Act or even in the rules framed by the High Court in respect of this matter is obvious. The relief being a purely discretionary one, it was also

left to the discretion of the High Courts to develop rules of prudence governing this aspect of the matter. As the whole matter was sought by the Legislature to be put in the realm of discretion the High Courts would while dealing with it, be guided by principles of justice, equity and good conscience. Approaching the matter from this point of view, the various High Courts have established precedents prescribing periods of limitation that should be considered reasonable, fair and proper by them, and which should determine the matter so far as the particular High Court is concerned. In the Allahabad High Court, there has been a long standing practice established by precedents not to entertain writ petitions which are filed 90 days beyond the date of the order sought to be impugned. This practice is now so well established as to justify one in styling the said period of 90 days as the conventional period of limitation observed in this Court. The practice is founded on the consideration that such proceedings are analogous to appeals in so far as they necessitate a reconsideration of the orders passed by the authorities concerned. The case of the Allahabad High Court which is regarded as the foundation of this practice in this Court is *Mongey* v. *The Board of Revenue, U. P., Allahabad* (1). In this case a Bench of this Court quoted a passage from Ferris on Extraordinary Legal Remedies in support of its view that 90 days' period should be considered to be the reasonable period for filing such applications. The relevant passage runs as follows:

> "So it has been held, by analogy to appeal, that the application must be made within the time for prosecuting an appeal, unless the petition discloses circumstances of a special nature requiring an extension of time."

(1) 1956 A.L.J. 354.

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Relying on this passage the Bench laid down the law as follows:

> "We consider that this is a correct statement of the law and in our opinion a period of 90 days, which is the period fixed for appeals to this Court from the judgments of courts below, should be taken as the period for application for the issue of a writ of *certiorari*, and that time can be extended only when circumstances of a special nature, which are sufficient in the opinion of the Court, are shown to exist."

This case no doubt lays down the period of 90 days as the basic period of limitation for filing a writ of *certiorari*. It is not, however, in our opinion, a warrant for the proposition that in computing the said period every factor that might have resulted in unavoidably delaying the filing of an application beyond the period of 90 days should be rigorously excluded from consideration. On the other hand, this case itself lays down that when circumstances of a special nature are made out then extension should be granted. Further, this case proceeds on the basis of analogy provided by an appeal. If the said analogy is pursued further and the exceptions relating to the basic period of limitation provided for appeals and other proceedings laid down in the Indian Limitation Act are examined, then, as the subsequent portion of our judgment indicates, the appellants would be entitled to the exclusion of the period spent in obtaining a copy of the order as well as of the period required for giving notice of motion.

That the period of 90 days which is the conventional period of limitation established in this Court is not so rigid as to exclude consideration of other matters will also be borne out by two other cases of this Court,

The first case is *Mehnga Ram* v. *India L. A. Tribunal* (1) This is a decision by a Division Bench In this case the order dismissing the application which was the basis of the proceedings was passed on the 25rd of April, 1956. The appeal against this order was dismissed on the 3rd of May, 1955 and the writ petition was filed on the 12th of September, 1955. The writ petition was, therefore filed after a period of over four months had elapsed from the date of the last order which was sought to be impugned. In spite of it the Court held that there was no such delay as to justify rejection of the petition merely on the ground of limitation. The ground on which the Court condoned the delay was that the question as to the forum where the particular writ petition should be filed was of such a difficult nature as to entail consideration of it for a fairly long period with the result that it was difficult to obtain proper legal opinion on this point within the limited period of 90 days.

The second case is *Brijpal Das* v. *Banaras Municipal Board* (2). In this case it was held that there was no period of limitation prescribed for the exercise of the powers under Article 226 by the High Court. But as the power itself is a discretionary one, the High Court generally would not exercise it in favour of a petitioner who has come to Court after a considerable delay No hard and fast rule can be laid down as regards the actual period which the High Court would consider as unreasonable and decline to interfere under Article 226 of the Constitution after the lapse of such a period. It will depend upon the circumstances of each case, and also on the nature of the right of the petitioner which has been affected by the impugned order. Where the writ petition was filed nearly five months after the impugned order of assessment was made and the petitioner possibly had still a right to challenge that order

(1) A.I.R. 1956 All. 544. (2) A.I.R. 1958 All. 211.

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when steps would be taken to realise the taxes, it could not be said in the circumstances that the delay was so gross as to disentitle the petitioner to get relief under Article 226 (vide Head-note A).

In a Full Bench case of the Travancore Cochin High Court *S. Mahadeva* v. *State* (1) it was held that the period available for a civil revision petition is the reasonable time within which an application under Article 226 should be presented. No hard and fast rule can, however, be fixed in that regard and the matter should be left to the discretion of the trying Judge or Bench to accept a petition though presented beyond that period and to deal with it on the merits (vide Head-note A). In this case it was further held that if a party had failed to raise the plea of laches at an earlier stage, it should not be allowed to raise the said plea at a later stage

In *Manohar Singh* v. *State of Rajasthan* (2) which is a Bench decision by WANCHOO, C. J. as he then was and BAPNA, J., it was held that the fact that the applicant had been attempting to get redress by making representations to various authorities would be a sufficient ground for condoning the delay in filing the writ petition. The remedy sought for and the relief prayed for by the petitioner could not, under such circumstances, be refused simply on the ground of delay. To the same effect is the law laid down by WANCHOO, C. J. as he then was and BAPNA, J., in *Firm Udairaj* v. *Commissioner, Civil Supplies* (3).

In *Muthiah Chettiar* v. *Income-tax Commissioner, Madras* (4), RAJAMANNER, C. J. and PANCHAPAKESA AYYAR, J., held that though there was no period of limitation as such prescribed for applications for the issue of prerogative writs, long delay can be one of the grounds

(1) A.I.R. 1951 Tr. Co. 163.
(2) A.I.R. 1958 Raj. 22.
(3) A.I.R. 1952 Raj. 79.
(4) A.I.R. 1951 Mad. 204.

for refusing to grant an application for the issue of such writs. There may, however, be circumstances which should make the High Court take a more lenient view and entertain the application even after delay (vide Head-note C.) In this case delay was condoned on the ground that the applicant was seeking his remedy from the Central Board of Revenue under erroneous advice.

In *Shambhu Dayal* v. PEPSU (1) a Bench of the High Court consisting of TEJA SINGH, C. J. and GURNAM SINGH, J., held that the fact that the petitioner was making various representations challenging the legality and propriety of the reversion order passed against him would be a good ground for condoning the delay and overruling the preliminary objection based thereon.

In Markose's Commentary on Judicial Control of Administrative Action in India (1956 Edition) while discussing the question of laches it is stated that there are two views found reflected in cases, one, that delay by itself should not disentitle the applicant to relief, and the other, that if vigilance is deemed desirable there is no logic in not recognising this ground for dismissal of writ applications. The second view is based on the ground that if it is not recognised, as an independent ground, vigilance will not be observed by applicants in actual practice. The meaning of laches in the said book is expounded at page 473 thus:

> "In equity reprehensible delay is called laches. it is only with laches that one is concerned here. Laches is such negligence or omission to assert a right as taken in conjunction with the lapse of time more or less great and other circumstances causing prejudice to an adverse party operates as bar in a court of equity."

(1) A I R 1956 Pep. 132

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The law on the point is summarised on the same page as follows:

> "The other consideration is that in equity itself the doctrine of laches is not an arbitrary or a technical doctrine. The summary of the law by Sir BARNES PEACOCK in *Lindsay Petroleum Co.* v. *Hurd* deserves repetition:
>
> > "Where it would be practically unjust to give a remedy either because the party has, by his conduct, done that which might fairly be regarded as equivalent to a waiver of it, or where by his conduct and neglect he has, though perhaps not waiving that remedy, yet put the other party in a situation in which it would not be reasonable to place him if the remedy were afterwards to be asserted, in either of these cases, lapse of time and delay are most material. But in every case, if an argument against relief, which otherwise would be just, is founded upon mere delay, that delay of course not amounting to a bar by any statute of limitations, the validity of that defence must be tried upon principles substantially equitable. Two circumstances, always important in such cases, are, the length of the delay and the nature of the acts done during the interval, which might affect either party and cause a balance of justice or injustice, in taking the one course or the other so far as relates to the remedy."

Apart from delay amounting to laches according to the rules stated above, the mere lapse of time, as Lord CAMPBELL observed in *Cairncross* v. *Lorimer* (1) as

(1) (1860) 3 L. T. 126 (H. L.).

evidencing acquiescences is not to be measured by any cycle of the heavenly bodies.

> "The courts in India have to develop the law by further analysis of each case and by finding out whether the facts call for a denial of relief to the applicant."

In paragraph 176 of Ferris book entitled "Extraordinary Legal . . . Remedies" (1926 Edition) it is stated that:

> "There is no hard and fast rule by which to determine whether the right to bring *certiorari* is barred by laches, as the issuance of the writ is largely a matter of sound discretion. The aggrieved party should have a reasonable time within which to make application."

In view of the above legal position it appears to us to be erroneous to throw out a writ petition *in limine* merely on the ground that a period of 90 days has elapsed since the date of the impugned order without considering the propriety, sufficiency or reasonableness of the situation, and applying one's mind to other factors that are alleged to have intervened and caused delay. The conventional period of limitation laid down by this Court is based on the principle of laches which itself is the offspring of the twin maxims of equity—the first being that equity helps the vigilant, and the second being that delay defeats equity. Where the Court is of opinion that application could not be filed within the period of 90 days owing to circumstances which were beyond the control of the party concerned, or other reasons which in equity would incline the Court to condone the delay, it appears to us that there is no bar in law to the entertainment of such an application. Where, however, an application is made beyond the period of 90 days, the party making the

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application owes an obligation to provide an adequate explanation of the same. The material provided in this regard should be such as to satisfy the Court that the circumstances alleged therein constitute sufficient cause for condoning the delay.

In the present case, the two circumstances alleged are (1) that the party had applied for a certified copy of the impugned order and (2) that the party had given fourteen days' notice to the Standing Counsel as required by the rules of this Court. We shall now proceed to discuss each one of them separately. In the light of the observations made by us above, it is obvious that the main question on which our decision would turn would be whether in equity there are justifiable reasons for allowing the petitioner to exclude the time taken by him under both or either of these heads.

So far as the first question, namely, the period taken in obtaining a certified copy of the order, which is sought to be challenged, is concerned, it would be relevant to refer to the provisions of Chapter XXII, rule 1, sub-rule (3) which specifies the documents which should accompany an application under Article 226 of the Constitution of India. Sub-rule (3) of rule 1 of Chapter XXII of the High Court Rules runs as follows:

> "Where objection is taken to any judgment or order of a court or an officer thereof the application shall be accompanied by a copy of such judgment or order and where there has been an appeal or revision from such judgment or order also by a copy of the judgment or order of the higher court."

Under the above rule which is made by this Court and which has the force of a statute so far as this Court is concerned, it is obvious that an application under Article 226 of the Constitution of India by the petitioner would not have been maintainable in this Court

unless it was accompanied by a copy of the judgment or order of the Deputy Director of Consolidation. A period of 90 days is allowed to a petitioner to enable him to make preparation for filing a writ petition in this Court, and to seek proper legal advice in respect of the judgment or order which is sought to be impugned. Before the petitioner could seek any such advice, it would be necessary for him to obtain a copy of such judgment or order. Apart, therefore, from the necessity arising out of the fact that the filing of a copy of such judgment or order is made necessary by the rules of this Court themselves, the necessity for obtaining a copy of such judgment or order also arises out of the fact that the securing of such copy is necessary in order to seek necessary legal advice and to make proper preparation for the filing of the application. Therefore in the absence of a copy of such judgment or order it was not possible for the petitioner to make proper preparations for filing the applications, and even if he had made such preparations, it was not possible for him to file an application in this Court without annexing a copy of the said judgment or order to the application which was sought to be filed by him.

In this connection it would be relevant to refer to the provisions of the Limitation Act dealing with the exceptions to the period of limitation prescribed therein for various proceedings that are contemplated by that Act. The period of limitation laid down in the first Schedule of the Act is the statutory period of limitation. This is no doubt a fixed and an inflexible period. In spite of it, the Legislature considered that there were certain equitable considerations which should entitle a party to the exclusion of certain periods of time in the computation of the basic statutory period. It is in view of these equitable considerations that the Limitation Act has sought to engraft certain

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exceptions to the rigid application of the statutory rule of limitation prescribed in the first schedule of the said Act. These exceptions are scattered in various sections of Parts II, III and IV of the Act. Section 5 of the said Act is as follows:

> "Any appeal or application for a review of judgment or for leave to appeal or any other application to which this section may be made applicable by or under any enactment for the time being in force may be admitted after the period of limitation prescribed therefor, when the appellant or applicant satisfies the Court that he had sufficient cause for not preferring the appeal or making the application within such period."

Section 12(2) and (3) of the Indian Limitation Act, 1908 runs as follows:

> "(2) In computing the period of limitation prescribed for an appeal, an application for leave to appeal and an application for a review of judgment, the day on which the judgment complained of was pronounced, and the time requisite for obtaining a copy of the decree, sentence or order appealed from or sought to be reviewed, shall be excluded.
>
> (3) Where a decree is appealed from or sought to be reviewed, the time requisite for obtaining a copy of the judgment on which it is founded shall also be excluded."

In fixing the conventional period, this Court has treated a writ petition as analogous to an appeal, and, following the same analogy, there appears to be no reason why provisions excluding certain periods in the computation of the period of limitation for filing an appeal, should not *mutatis mutandis* be applied to such petitions. In interpreting section 12(2) and (3) of the Indian Limitation Act, the Courts have held that a

party would be entitled to exclude the period spent in obtaining a copy of the judgment or order sought to be impugned even though the annexation of a copy of the said judgment or order is not necessary for the purpose of filing the appeal or application referred to therein. This view of the case is based upon the ground that it is necessary to obtain a copy of the judgment or order sought to be challenged for the purpose of enabling the party to make up its mind whether it should seek any relief against the order or not. So far as the Courts in India are concerned, the leading case on the above point is reported in [*Jijibhoy N. Surty* v. *T. S. Chettyar* (1).] In this case their Lordships of the Privy Council laid down that in reckoning the time for presenting an appeal, the time required for obtaining a copy of the decree and judgment must be excluded, even though by the rules of the Court it is not necessary to file such copies with the memorandum of appeal. The same view was taken in a Full Bench case of the Allahabad High Court in *Keshar Sugar Works* v. *R. C. Sharma* (2) as well as in a Division Bench case of the Allahabad High Court in *Municipal Board* v. *Bhagwan Das* (3). Approaching the matter therefore, from the equitable point of view the present case is a much stronger one for the exclusion of time taken in obtaining a copy of the impugned judgment or order, as the annexation of such a copy with the application is an imperative requirement under the rules framed by this Court. Under the circumstance, we are of opinion that in computing the period of limitation of 90 days which is the conventional period observed by this Court, a party should be held to be legitimately entitled to exclude the said period.

There is another reason also why the present case should be considered to be a stronger one than a case

(1) A.I.R. 1928 P.C. 108. (2) A.I.R. 1951 All. 122.
(3) A.I.R. 1959. All. 500.

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under the Limitation Act. A case under the Limitation Act is after all governed by the rigid rules of law which are inflexible. On the other hand, so far as the conventional period of limitation relating to writ petitions is concerned, it is not governed by any such rigid rules of law. The question in such a matter is drawn exclusively within the realm of equitable jurisdiction of the Court and, therefore, in considering the matter, the hands of the Courts are not tied down by the shackles of law. It can, therefore, move more freely, and has a wider range within its reach. In such a case, therefore there is nothing to prevent a court from taking into consideration every equitable circumstance that might have resulted in causing unavoidable delay in filing the writ petition. The principle on which the Limitation Act proceeds is the principle of public policy which is a principle of narrower application. On the other hand, the principle on which the Court in such a matter proceeds is the principle of equity which is a principle of much wider application. In the latter case, it is open to the Court to mould the relief in this regard according to the particular circumstances of each case.

The inequitable consequences of not excluding the period spent in obtaining a copy of the order or judgment sought to be impugned will be apparent by taking the instance of a case in which a party, in spite of due diligence, is unable to obtain a certified copy of the said order or judgment within a period of 90 days. Supposing that the office to which an application for copy has been made issues the copy after a period of 95 or 100 days. In such a case the party would be debarred altogether from filing the writ petition, as the Rules of Court require that the filing of such a copy along with the petition is a condition precedent to the maintainability of the petition. The

result would be that whenever an authority does not want that its order or judgment be challenged, it has only to instruct its office to delay the preparation of the copy beyond a period of over 90 days with the result that the order of the said authority, however erroneous, illegal or perverse would become impregnable and incapable of being challenged in the High Court by means of writ proceedings. A party would thus be thrown at the mercy of the Copying Department and would be penalised for no fault of his own. This would be a highly inequitable situation, and would be against all canons of justice and fair play. For the above reasons, we have no hesitation in holding that a petitioner filing a writ petition should be considered entitled to exclude the period spent in obtaining a copy of the impugned judgment or order.

The next question that has arisen in the present case is whether the petitioner should be further entitled to exclude the period of 14 days which is the prescribed period for the service of notice upon the Standing Counsel under Chapter XXII, rule 1, sub-rule (4) of the Rules of this Court. Chapter XXII, rule 1, sub-rule (4), runs as follows:

> "Where the Government or an officer or department of the Government, or a court, or a Tribunal, Board, Commission or other body appointed by the Government is an opposite-party named in the application, the applicant shall before presenting the application serve notice of motion upon the Government Advocate in criminal matters and upon Standing Counsel, if he is authorised to receive notice on behalf of such opposite-party, in other matters along with as many copies of the application, affidavit and other papers accompanying it as may be equal to the number of parties to be represented by the Government

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Advocate or the Standing Counsel, as the case may be, and one extra copy for the use of the Government Advocate or the Standing Counsel naming therein the day for the making of the motion. The application shall indicate that such notice of motion has been served. There shall be at least fourteen clear days between service of notice of motion and the day named therein for the making of the motion except where the matter is one of urgency and the permission of the Court is obtained for making such motion earlier."

It is conceded that the above rule applies to the present case. The most important point to notice in this connection is again the fact that service of motion is a part of the mandatory requirement of the above rule which has the force of law in this Court. A party might have prepared his writ petition within the prescribed period of 90 days which is the conventional period of limitation. All the papers connected therewith might also have been obtained by it. In spite of it, according to the above mentioned rule, the party is not entitled to present his application under Article 226 of the Constitution unless and until he gives fourteen days' notice of the presentation of the same to the Standing Counsel. Judging the matter from an equitable point of view, we have no doubt in our mind that a party should be entitled to the exclusion of this period provided, of course, that the required notice has actually been given before the period of 90 days counted after excluding the period spent in obtaining a copy of the impugned judgment or order has not expired. In this connection again it would be relevant to refer to two maxims of equity on which the exclusion of this period must be based. The first is *"Actus Curiae Neminem Gravabit"* (An act of the court will prejudice no man; an act of the court will hurt no man). The second is *"Lex*

Non Cogit Ad Impossiblia" (The law does not force a man to impossibilities: The law does not compel a man to do what he cannot possibly perform). The requirement that fourteen days' notice of motion shall be given to the Government Counsel under the above rule is a requirement under a rule which has the force of law in the Allahabad High Court, and the rule in question was framed by this Court. It is, therefore, only fair that a party, who is ready with his application within the conventional period of limitation prescribed by this Court, should not be made to suffer as a result of the action of this Court requiring him to do certain other acts before he can file it.

The inequity of the position will be evident if we contemplate a position where the Court instead of requiring fourteen days as the period of notice, prescribed a period of 95 or 100 days for such notice. It is, in fact, open to this Court to amend the above rule in this fashion. The result then would be that the party would never be able to present a petition which requires such notice within the conventional period of 90 days. The consequence would be that every writ petition to which sub-rule (4) of Rule 1 of Chapter XXII applies, would have to be dismissed in this Court. A party would thus be debarred altogether from seeking this salutary relief at the doors of this Court, and the entire provisions of Article 226 of the Constitution of India would stand completely nullified in such cases.

In this connection an argument was advanced before us on behalf of the opposite-parties that in this sub-rule the expression relating to the presentation of an application is used in a sense different from the expression relating to the service of notice of motion. It was further argued that what was really prohibited by this rule was not the presentation of the application but the

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making of the motion. A party could, therefore, present the application within the usual period open to him. It was only barred from making any motion in this Court in respect of it until after the expiry of fourteen days. In this connection a distinction was sought to be drawn between the presentation of the application and the notice of motion, and it was strenuously contended before us that the making of the motion refers to a case where a party seeks some action on the part of the court apart from the presentation of the application. The argument is an ingenious one and has also the appearance of plausibility. On a closer scrutiny of it, however, we are not disposed to accept it. No doubt the bare act of presentation may not be identical with the act of making the motion in every case. In the context, however, in which the words "presenting the application" are used in sub-rule (4), it appears to us that the said expression incorporates within it the idea of making the motion. This interpretation would be strongly supported by a reference to the last sentence of this very sub-rule which requires a party to name the day for the making of the motion at the time of the service of notice of motion. If the party has already presented the application in court and has parted with the necessary papers, it is not possible for it to present the same papers again on the day named by it. It would, therefore, be unable to make the motion on that day. At any rate, the party having already parted with the necessary papers, the matter would be out of its hands.

The same interpretation is supported by a reference to Chapter XI, rule 1 of this Court which lays down that "Every memorandum of appeal or objections under rule 22 or 26 of Order XLI of the Code and every application shall be presented for admission in

Court." The above rule indicates that every application which is presented in this Court is presented for a certain purpose, that purpose being "admission in Court". The presentation of every application, therefore necessarily carries with it a prayer for certain action on the part of the Court. The action might not be immediate but the very physical act of presentation is at least an invitation to the Court to take the action contemplated in this rule. The presentation of the application cannot, therefore, be divorced from the purpose for which it is presented viz., "admission". The said purpose is defined in the first part of rule (1) of Chapter XI. The second part of the same rule lays down that "This rule shall not apply to appeals and applications that may under these Rules be filed before the Registrar or other officer". There is, therefore, an obvious distinction between the two kinds of presentation viz., presentation of an application to a Judge of this Court and the presentation of an application to the Registrar or other officer. The latter may be construed to be bare presentation but not the former. The reason may be that the act of receiving the application was in the latter case contemplated as of a merely ministerial nature, whereas in the former case it was envisaged as one of a fully judicial nature.

It would also be relevant in this connection to refer to Chapter XXII, rule 1, sub-rule (1). This provision relates to the manner in which writ petitions are moved in this Court. In this sub-rule it is laid down that a writ application other than a writ in the nature of a Habeas Corpus shall be "made" to the Division Bench appointed to receive such application, or in its absence, to the Judge appointed to receive applications in civil matters. The very fact that the framers of the rules use the word 'made' and not the word 'presented' indicates that the filing of a writ application is done for the

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purpose of seeking an order from the Court and not just doing the bare act of presentation.

It would also be relevant in this connection to refer to Halsbury's Laws of England (Simonds' Edition) Volume 11, page 23, foot-note (t) which indicates that that a writ petition is to be treated as an application to show cause in a matter.

Our attention was also invited by the learned counsel on behalf of the applicant to Section 26 of the Code of Civil Procedure which provides that "Every suit shall be instituted by the presentation of a plaint or in such other manner as may be prescribed." Similarly Order 4, rule 1 relates to the presentation of a plaint and Order 33, rule 3 relates to the presentation of an application for permission to sue as a pauper. Reference in this connection may also be made to Chapter XV, rule 1, sub-rule (1) of the Rules of this Court which lays down that every suit is to be instituted by the presentation of a plaint to the Judge appointed to receive applications. On behalf of the appellants it is suggested that in view of the difference in the context of the expression relating to presentation in these provisions, the said expression may bear a meaning different from the one it has in Chapter XXII, rule 1(1) which relates to the presentation of writ petitions

Our attention in this connection was also drawn to Order 6, rule 1 of the Supreme Court Rules in which the making of a motion is treated as identical with the presentation of an application. The meaning of the expression "presentation of the application" would, therefore, depend upon the context in which the said expression is used bearing in mind the nature of the application which is sought to be presented and its purpose. Approaching the matter from this standpoint,

in our opinion, the expression relating to the presentation of the application in Chapter XXII, rule 1, sub-rule (4) of the High Court Rules is to be interpreted as synonymous with the making of motion; or rather the former should necessarily be deemed to incorporate the latter. This interpretation would also be more conducive to convenience in so far as it would enable a party to name the day for the making of the motion. This interpretation, therefore, is to be preferred as it would facilitate the smooth working of the rule in practice and subserve the purpose which the rule was designed to achieve.

It may also be noted that the rule in question states that "there shall be at least fourteen clear days between service of notice of motion and the day named therein for the making of the motion." The use of the word "clear" in this connection puts it beyond doubt that the framers of the rule intended that in computing the period the date of service of notice was to be excluded.

In Maxwell's Interpretation of Statutes (Ninth Edition) at page 350 the meaning of the expression "clear days" is expounded thus:

> "Again, when so many 'clear days', or so many days 'at least' are given to do an act, or 'not less than' so many days are to intervene, both the terminal days are excluded from the computation."

In the Rules of the High Court the method of reckoning of time in such cases is prescribed in Chapter I, rule 4 which provides as follows:

> "Where any particular number of days is prescribed by these Rules, the same shall be reckoned exclusively of the first day and inclusively of the last day, unless the last day shall happen to fall on a day on which the offices of the Court are closed,

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in which case the time shall be reckoned exclusively of that day also and of any succeeding day or days on which the offices of the Court continue to be closed."

The result, therefore, is that the party presenting the application would be entitled to exclude the entire period of fourteen days, excluding the days on which the notice was served.

In this connection, it will be relevant to observe that the Limitation Act also contains an analogous provision entitling a party to exclude the period of notice required in cases of suits. Section 15, sub-section (2) of the Limitation Act runs as follows:

> "In computing the period of limitation prescribed for any suit of which notice has been given in accordance with the requirements of any enactment for the time being in force, the period of such notice shall be excluded."

Although writ proceedings are for the purposes of fixing the conventional period of limitation treated as analogous to appeals, they are really proceedings in the exercise of original jurisdiction. The array of parties is a different one. Fresh material is imported into the case by the requirement of affidavit or affidavits which are to be filed with it. Fresh documentary evidence may also be filed. In fact Rule 8 of Chapter XXII of the Rules of Court expressly sanctions the production of fresh evidence by laying down as follows:

> "All questions arising for determination under this Chapter shall be decided ordinarily upon affidavits, but the Court may direct that such questions as it may consider necessary be decided on such other evidence and in such manner as it may deem fit and in that case it may follow such procedure and may pass such order as may appear to it to be just."

As original proceedings, therefore, they are in the nature of suits, and the provisions of section 15(2) of the Limitation Act can be referred to for guidance in this regard by way of analogy. As already observed the provisions of Chapter XXII, rule 1(4) have the force of an enactment so far as this Court is concerned. Applying, therefore, the analogy of section 15(2) of the Limitation Act, the period of notice which is required under Chapter XXII, rule 1(4) to be given to the Standing Counsel should be excluded in computing the conventional period of limitation prescribed for writ petitions. In fact, the exceptions provided in the Limitation Act are, as already observed, themselves based on equitable principles which are engrafted in the statute for the purpose of softening the rigour of the first schedule which prescribes the strict periods of limitation for proceedings mentioned therein

It would also appear that the Limitation Act itself did not intend to confine the operation of these exceptions within the four corners of the law of limitation as laid down in the Limitation Act. A perusal of section 29(2) of the Indian Limitation Act (IX of 1908) would indicate that unless expressly provided otherwise the provisions contained in section 4, sections 9 to 18 and section 22 would also be applicable to any special or local law prescribing the period of limitation for any suit, appeal or application. In the present case the relevant provision with regard to the exclusion of time spent in obtaining copy of judgment or order is contained in section 12 and with regard to the exclusion of time taken in complying with the requirement of notice is contained in section 15. Both these sections were, therefore, specifically mentioned in section 29 of the Limitation Act. Both of them were, therefore, intended by the framers of the Indian Limitation Act to be extended to special and local laws as well. The

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conventional period of limitation laid down by the Allahabad High Court with regard to writ petitions may in a sense be termed as "special law." The application of both these sections may, therefore, be attracted on this basis as well.

On behalf of the opposite party it was argued that the provisions of sections 12 and 15 of the Limitation Act are not applicable to writ proceedings. Even presuming that this is so, in our opinion, it would not be irrelevant to refer to them for the purpose of determining whether the exemption claimed is justifiable on the ground of equity, justice and good conscience. In fact, we have referred to these provisions not because we are of opinion that they are strictly applicable to writ proceedings, but only as providing an analogy which can be drawn upon for the purpose of determining the question whether the exclusion claimed is justifiable and reasonable from the point of equity.

So far as the position of law in India is concerned, it is summarised in para 21 of Chapter XXIX of Chaudhuri's book on the Law of Writs and Fundamental Rights, Volume II (1960 Edition), under the heading of "Limitation". The relevant passage runs as follows:

> "In India no time limit has been fixed by statute or rules of Court for either prohibition, *certiorari*, *mandamus* or *quo warranto*. These extraordinary remedies being discretionary and based on the principle of *quia timet* the party desiring the assistance of the Court through any of these methods must apply promptly.
>
> An application for a writ of *certiorari* or other writs should be filed within a reasonable time from the date of the order which the applicant seeks to be quashed. Ordinarily a period of six months may be considered reasonable, but in extraordinary

circumstances the High Court may, in its discretion, excuse the delay. The exercise of powers under Article 226 by the Court irrespective of any time-lag will introduce complications and unsettle rights finally decided by authorities empowered to do so. The Allahabad, Travancore Cochin and Kerala High Courts have, however, held that the conventional period permitted for presentation of civil revision petitions may be regarded as a reasonable time for the presentation of applications for writ, orders or directions under Article 226. But there is no hard and fast rule in the matter and it would be within the discretion of the Court trying the petition to interfere in appropriate cases even if the application is presented beyond the aforesaid period."

Finally, it was argued on behalf of the opposite-parties that the order of the learned single Judge being a discretionary one, it would not be proper to interfere with it at the stage of appeal. Learned counsel cited a large number of authorities in support of his contention in this regard. It is no doubt correct that the appellate court is reluctant to interfere with orders of a purely discretionary nature passed by the original Court. In the present case, however, it appears to us that the original Court did not apply its mind to the various aspects of the matter which require consideration when determining the question of limitation in the matter of writs. On behalf of the appellant the learned counsel stated before us that the learned single Judge did not allow him to argue the points as he was of opinion that both the heads on the basis of which extension of Limitation was claimed were quite foreign to the enquiry relating to a consideration of the question of limitation in the matter of writs. The order

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itself is a brief one, and does indicate that consideration of these matters was, in the opinion of the learned Judge, considered extraneous to the issue with which he was faced. Under these circumstances, even though the order was of a discretionary nature, it appears to us that the discretion vested in the Court was not exercised on recognised judicial and equitable principles. We are, therefore, constrained to hold that the impugned order cannot be sustained and must be set aside

It is conceded that if the period spent in obtaining the copy and fourteen days required for service of notice of motion on the Standing Counsel are excluded, then the petition would not be barred by the conventional rule of limitation. This appeal must, therefore, be allowed As, however, we have not heard the appellants' counsel on the merits of the matter, the case will have to be remanded for decision to a single Judge.

Before closing our judgment, we feel that we must express our appreciation of the ability and efficiency with which the case was presented before us by Mr. *Rama Charan Verma*, the learned Counsel for the appellants.

We, accordingly, allow this appeal, set aside the order dated the 18th of April, 1960, and remand the case to a single Judge for decision on merits. Under the circumstances of the case, we make no order as to costs.

Appeal allowed.

SUPREME COURT

APPELLATE CRIMINAL

Before the Hon'ble Mr. Justice Gajendragadkar, the Hon'ble Mr. Justice Sarkar, the Hon'ble Mr. Justice Wanchoo, the Hon'ble Mr. Justice Das Gupta and the Hon'ble Mr. Justice Ayyangar.

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April, 27

HARNAM DAS

v.

STATE OF UTTAR PRADESH

[ON APPEAL FROM THE HIGH COURT AT ALLAHABAD]

Forfeiture of publications *which are seditious or tend to promote class hatred or are calculated to outrage religious feelings—Governments order of forfeiture without stating grounds of its opinion, validity of—Scope of High Court's power in setting aside an order of forfeiture—Code of Criminal Procedure, 1898, ss. 99-A, 99-B and 99-D.*

(*Per* Majority, DAS GUPTA, J. contra).

The power of the High Court under s. 99-D of the Code of Criminal Procedure is limited to examining the grounds of opinion of the State Government on the publication in question being seditious or tending to promote class hatred or calculated to outrage religious feelings so as to be punishable under any one or more of sections 124-A, 153-A or 295 of the Penal Code. Wherefore, if the State Government does not state in the order the grounds of its opinion, the order of forfeiture must be set aside on that ground alone. The High Court, in such a case, has no power to examine for itself whether the publication is in fact punishable under the sections aforesaid so as to entail forfeiture.

Bajnath v. *Emperor* (1), *Premi Khemraj* v. *Chief Secretary* (2), *N. Veerabrahmam* v. *State of Andhra Pradesh* (3) and *Baba Khalil Ahmad* v. *State of U. P.* (4) over-ruled.

Arun Ranjan Ghose v. *State of West Bengal* (5) approved.

(1) A.I.R. 1926 All. 195. (2) A.I.R. 1951 Raj. 113.
(3) A.I.R. 1959 A.P. 572. (4) A.I.R. 1960 All. 715.
(5) (1958) 59 C.W.N. 985.

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(*Per* DAS GUPTA, J.)—That the Government should record the grounds of its opinion is undoubtedly a salutary provision diminishing, as it does, the risk of an arbitrary order. There is, however, no justification for the view that the High Court can not or is not in a position to interfere unless the grounds of its opinion are stated by the State Government. The duty cast by s. 99-D of the Code of Criminal Procedure on the Judges of the High Court is not to see whether in a particular case the grounds stated by the Government for forming its opinion are correct but to see whether the opinion formed was correct. To perform this duty the one and the only way is to examine the document with a view to determine the question whether the publication falls within or is punishable under any one or more of sections 124-A, 153-A and 295 of the Penal Code.

Criminal Appeal no. 74 of 1961, from the judgment and order dated the 7th May, 1957 of the Allahabad High Court in Criminal Miscellaneous no. 2006 of 1953.

The facts appear in the judgments.

Veda Vyas, Senior Advocate (*S. K. Kapur* and *Ganpat Rai*, Advocates, with him) for the appellant.

G. C. Mathur and *C. P. Lal*, Advocates for the respondent.

The following judgments of the Court were delivered by—

SARKAR, J.:—The only question that was argued in this appeal is substantially one of construction of section 99-D of the Code of Criminal Procedure.

The appellant was the author of two books in Hindi called Sikh Mat Khandan Part I and Bhoomika Nazam Sikh Mat Khandan which he had published in April, 1953. On 30th July, 1953, the Government of Uttar Pradesh, the respondent in this appeal, made an order under section 99-A of that Code forfeiting these books which were thereupon seized and taken away. That order, so far as material, was in the following terms: "In exercise of its powers conferred by section 99-A of

the Code of Criminal Procedure . . . . the Government is pleased to declare the books . . . . forfeited to Government on the ground that the said books contain matter, the publication of which is punishable under sections 153-A and 295-A of the Indian Penal Code." It is the validity of this order that is challenged in the present appeal.

Section 99-A under which the order was made, so far as relevant, is in these terms:

> "Where any newspaper, or book . . . . or any document . . . . appears to the State Government to contain any seditious matter or any matter which promotes or is intended to promote feelings of enmity or hatred between different classes of the citizens of India or which is deliberately and maliciously intended to outrage the religious feelings of any such class by insulting the religion or the religious belief of that class, that is to say, any matter the publication of which is punishable under section 124-A or section 153-A or section 295-A of the Indian Penal Code, the State Government may, by notification in the Official Gazette stating the grounds of its opinion, declare . . . . every copy of such book . . . . to be forfeited to Government . . . . ".

Two things appear clearly from the terms of this section. The first thing is that an order under it can be made only when the Government forms a certain opinion. That opinion is that the document concerning which the order is proposed to be made, contains "any matter the publication of which is punishable under section 124-A or section 153-A or section 295-A of the Penal Code." Section 124-A deals with seditious matters, section 153-A with matters promoting enmity between different classes of Indian citizens and

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section 295-A with matters insulting the religion or religious beliefs of any class of such citizens. The other thing that appears from the section is that the Government has to state the grounds of its opinion. The order made in this case, no doubt, stated that in the Government's opinion the books contained matters the publication of which was punishable under sections 153-A and 295-A of the Penal Code. It did not, however, state, as it should have, the grounds of that opinion. So it is not known which communities were alienated from each other or whose religious beliefs had been wounded according to the Government, nor why the Government thought that such alienation or offence to religion had been caused.

Now section 99-B gives the person interested in the books, or documents forfeited, a right to apply to the High Court to set aside the order made under section 99-A, and section 99-D specifies the High Court's duty on such an application being made to it. These two sections will have to be especially considered in this case and so they along with section 99-C, are set out below:

> *Section 99-B.* Any person having any interest in any newspaper, book or other document, in respect of which an order of forfeiture has been made under section 99-A, may, within two months from the date of such order, apply to the High Court to set aside such order on the ground that the issue of the newspaper, or the book or other document, in respect of which the order was made, did not contain any seditious or other matter of such a nature as is referred to in sub-section (1) of section 99-A.
>
> *Section 99-C.* Every such application shall be heard and determined by a Special Bench of the High Court composed of three Judges.

Section 99-*D*. (1) On receipt of the application, the Special Bench shall, if it is not satisfied that the issue of the newspaper, or the book or other document, in respect of which the application has been made, contained seditious or other matter of such a nature as is referred to in sub-section (1) of section 99-A, set aside the order of forfeiture.

We think it fairly clear from these sections that the ground on which an application can be made under section 99-B is the ground which, if established, would require the High Court to set aside the order under section 99-D.

The appellant had moved the High Court at Allahabad under section 99-B to set aside the order of forfeiture of his books. It seems to have been contended in the High Court that the order of forfeiture should be set aside on the ground that the grounds of the Government's opinion had not been stated. With regard to this contention the High Court observed, "The requirement to state the ground is mandatory. A mere citation of words of the section will not do. But as has been held by a Special Bench of this Court in *Baijnath* v. *Emperor* (1) with which we respectfully agree, the High Court in view of the provisions of section 99-D of the Code of Criminal Procedure is precluded from considering any other point than the question whether in fact the document comes within the mischief of the offence charged." In this view of the matter the High Court refused to set aside the order on account of the omission to state the grounds of the opinion. The High Court then proceeded to examine the books for itself and found that their contents were "obnoxious and highly objectionable" and dismissed the application observing that the appellant had "entirely failed to show that the books did not contain matters which promoted feelings of enmity and hatred

(1) A.I.R. 1925 All. 195.

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between different classes, or which did not (sic) insult or attempt to insult the religion or religious beliefs of the Sikhs". The present appeal arises out of this order of the High Court.

The High Court was of the view that its duty under section 99-D was only to see "whether in fact the document comes within the mischief of the offence charged". It thought that a document would be within the mischief of the offence charged if, in its own opinon, it contained matters the publication of which would be punishable under either section 124-A, or section 153-A or section 295-A of the Panel Code as mentioned in the order of forfeiture, irrespective of the Government's opinion on the matter. Otherwise, it seems to us, the High Court could not uphold the order for the reason that in its view the books offended the Sikhs and the Sikh religion in spite of the fact that there is nothing to show that the Government thought that the books had that effect. The same view appears to have been taken in certain other cases, namely, *Premi Khem Raj* v. *Chief Secretary* (1), *N. Veerabrahman* v. *State of Andhra Pradesh* (2) and *Baba Khalil Ahmad* v. *State of U. P.* (3) Apparntly, it was thought in these cases that the words "if it is not satisfied that . . . the book . . . contained seditious or other matter of such a nature as is referred to in sub-section (1) of section 99-A in section 99-D meant, not so satisfied for any reason whatsoever irrespective of the reasons on which the Government formed its opinion about it. We are unable to accept this construction of section 99-D.

The question is what do the words "matter of such a nature as is referred to in sub-section (1) of section 99-A" appearing in section 99-D mean? Do they mean any matter of that nature as the High Court thought?

(1) A.I.R. 1951 Raj. 118.
(2) A.I.R. 1959 A.P. 672.
(3) A.I.R. 1960 All. 715.

Or do they mean only those on which the order of forfeiture was based, that is, those which for the reasons stated by it, the Government thought were punishable under one or more of sections 124-A, 153-A and 295-A of the Penal Code mentioned by it? It seems to us that the latter is the correct view and follows inevitably if sections 99-A, 99-B and 99-D are read together, as they must.

Now section 99-D is concerned with setting aside an order. That order is one made under section 99-A. An order under that section can be made only when certain things have appeared to the Government and the Government has formed a certain opinion. The section further requires the Government to state the grounds of its opinion. It is this order, that is, the order based on the grounds stated, which the party affected has been given by section 99-B the right to move the High Court to set aside. It would follow that all that section 99-B can require the party to do is to show that that order was improper. Whether that order was proper or not would, of course, depend only on the merits of the grounds on which it was based; whether another order to the same effect could have been made on other grounds is irrelevant, for that would not show the validity of the order actually made; that order would be bad if the grounds on which it is made do not support it. Two orders, though both saying that a publication contains matter which offends the same section of the Penal Code cannot be the same or an identical order if the reasons why they are considered so to offend the section of the Penal Code concerned are different. Now section 99-B says that a person affected by the order may move the High Court to set it aside on the ground that the book "did not contain any seditious or other matter of such a nature as is referred to in sub-section (1) of section 99-A". The

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matter mentioned here must, for the reasons stated, refer only to such matter on which for the grounds stated by it, the Government's opinion has been based.

We proceed now to section 99-D. It is concerned with the same order of forfeiture. An order contemplated by section 99-D is made on an application under section 99-B. That order must therefore accept or reject the grounds on which the application under section 99-B was made. These grounds, as we have seen, are confined to challenging the propriety of the grounds on which the Government's opinion resulting in the order, was based. The words which we have earlier quoted from section 99-B occur substantially in the same form in section 99-D. The scope of the two sections is identical. The common words occurring in them must, therefore, have the same meaning in both. They must hence, in section 99-D also mean such matters on which for the grounds stated by it the Government's opinion was based. They cannot mean, as the High Court thought, any matter whatsoever, irrespective of the Government's reasons for making the order, which in the High Court's opinion would have justified it.

This view of the matter also explains why section 99-A requires the Government to state the grounds of its opinon. The reason was to enable the High Court to set aside the order of forfeiture if it was not satisfied of the propriety of those grounds. If it were not so, the grounds of the Government's opinion would serve no purpose at all. This would specially be so as section 99-G provides that an order of forfeiture cannot be called in question except in accordance with the provisions of section 99-B. If the order could be upheld, as the High Court seems to have thought, on grounds other than those on which the Government based its opinion, there would have been no need to provide

that the grounds of the Government's opinion should be stated; such grounds would then have been wholly irrelevant in judging the validity of the order.

The acceptance of the interpretation put by the High Court would lead to a result which, in our view, would be wholly anomalous. The order of forfeiture with which section 99-D is concerned is indisputably an order under section 99-A. Now, an order under that section is essentially an order of the Government and of no one else. Take a case where the Government making the order states the grounds of its opinion on which the order is based. Suppose the Government says that the expression of view A in the book concerned offends the religious beliefs of community X. Now assume that in an application made to set it aside, the High Court was not satisfied that view A could offend community X but thought that another expression of view in the same book which we will call B, offended the religious beliefs of a different community, say community Y. If in such a case the High Court upheld the order, which, if the view of the Court below is right, it could do, there would really be an order of forfeiture made by the High Court and not by the Government, because the Government in stating the grounds of its opinion had not, since it did not say so, thought that view B could offend the religious beliefs of community Y. We think it impossible that the sections concerned contemplated such a result; the Code nowhere provides for an order of forfeiture being made by the High Court. We are, therefore, of opinion that under section 99-D it is the duty of the High Court to set aside an order of forfeiture if it is not satisfied that the grounds on which the Government formed its opinion that the books contained matters the publication of which would be punishable under any one or more of sections 124-A, 153-A or 295-A of the Penal Code could

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justify that opinion. It is not its duty to do more and to find for itself whether the book contained any such matter whatsoever.

What then is to happen when the Government did not state the grounds of its opinion? In such a case if the High Court upheld the order, it may be that it would have done so for reasons which the Government did not have in contemplation at all. If the High Court did that, it would really have made an order of forfeiture itself and not upheld such an order made by the Government. This, as already stated, the High Court has no power to do under section 99-D. It seems clear to us, therefore, that in such a case the High Court must set aside the order under section 99-D, for it cannot then be satisfied that the grounds given by the Government justified the order. You cannot be satisfied about a thing which you do not know. This is the view that was taken in *Arun Ranjan Ghose* v. *State of West Bengal* (1) and we are in complete agreement with it. The present is a case of this kind. We think that it was the duty of the High Court under section 99-D to set aside the order of forfeiture made in this case.

We accordingly allow the appeal and set aside the Government's order of forfeiture dated 30th July, 1958. The appellant will be entitled to a return of all books, documents and things seized under that order.

DAS GUPTA, J.:—By a notification dated 30th July, 1953, the Uttar Pradesh Government acting under section 99-A of the Code of Criminal Procedure declared the books "Sikh Mat Khandan, Part I" and "Bhoomika Nazam Sikh Mat Khandan" which had been published by the appellant Harnam Das in April, 1953, forfeited to government on the ground that these books contained matters the publication of which was punishable under section 153-A and section 295-A of the

(1) (1955) 59 C.W.N. 495.

Indian Penal Code The High Court held on an examination of the books that they clearly came within the mischief of section 153-A and section 295-A of the Indian Penal Code. Accordingly it held that the order of the State Government forfeiting the two books was eminently just and proper and in that view dismissed the application.

One argument appears to have been raised that the order of forfeiture should be set aside as the notification by which the government made the declaration of forfeiture did not state the grounds of the government's opinion as required by section 99-A. The High Court rejected this argument being of opinion that in view of the provisions of section 99-D of the Code of Criminal Procedure the High Court was "precluded from consideration of any other point than the question whether in fact the document comes within the mischief of the offence charged."

It is quite clear that the government notification did not state the grounds of the opinion formed by the government that these documents contained matters the publication of which was punishable under section 153-A and section 295-A of the Indian Penal Code. The question raised before us is whether the High Court was right in rejecting the argument that the order of forfeiture should be set aside on the ground that grounds of the government's opinion were not stated in the government notification as required by section 99-A. The view which prevailed with the learned judges in respect of this question was in accord with what had been held by the same High Court in an earlier case of *Baijnath* v. *Emperor* (1) and by the Rajasthan High Court in *Premi Khem Raj* v. *Chief Secretary* (2). The same view has later on been taken

(1) A.I.R. 1925 All. 105. (2) A.I.R. 1951 Raj. 213.

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by the Andhra Pradesh High Court in *N. Veerabrahmam* v. *State of Andhra Pradesh* (1) and by the Allahabad High Court in a later decision in *Baba Khalil Ahmad* v. *State of U. P.* (2). A contrary view appears to have been taken by the Calcutta High Court in *Arun Ranjan Ghose* v. *The State of West Bengal* (3). The material portion of section 99-A is in these words:

> "Where any newspaper, or book . . . or any document . . . . appears to the Government to contain any seditious matter or any matter which promotes or is intended to promote feelings of enmity or hatred between different classes of the citizens of India or which is deliberately and maliciously intended to outrage the religious feelings of any such class by insulting the religion or the religious belief of that class, that is to say, any matter the publication of which is punishable under section 124-A or section 153-A or section 295-A of the Indian Penal Code, the State Government may, by notification in the official Gazette stating the grounds of its opinion, declare . . . every copy of such book . . . to be forfeited to the government."

It is clear therefore that before any government makes a declaration forfeiting a book under the provisions of this section it has first to be of opinion that the book does contain a matter the publication of which is punishable under section 124-A or section 153-A or section 295-A of the Indian Penal Code. Once it forms such an opinion the government has the power to declare the book forfeited. The section requires that this must be done by a notification in the official *Gazette* and in that notification the government is required to state the grounds on which it formed the opinion.

(1) A.I.R. 1959 Andhra Pradesh 572.
(2) A.I.R. 1960 All. 745.
(3) (1955) 59 C.W.N. 495.

The legislature however did not make such an order made by the government immune from any attack. In section 99-B it has provided the means by which the aggrieved person may obtain relief against the order if in fact the government was wrong in its opinion and the book did not contain a matter the publication of which is punishable under section 124-A, or section 153-A or section 295-A of the Indian Penal Code. Section 99-B runs thus:

> "Any person having any interest in any newspaper, book or other document, in respect of which an order of forfeiture has been made under section 99-A, may, within two months from the date of such order, apply to the High Court to set aside such order on the ground that the issue of the newspaper, or the book or other document, in respect of which the order was made, did not contain any seditious or other matter of such a nature as is referred to in sub-section (1) of section 99-A."

Section 99-D provides that if after hearing the application the High Court is not satisfied that the issue of the document in question contains any seditious matter or any other matter referred to in section 99-A, that is to say, any matter the publication of which is punishable under section 124-A or section 153-A or section 295-A of the Indian Penal Code the High Court shall set aside the order of forfeiture. The necessary result of the provision also is that if the High Court is satisfied that the book in question contains matter the publication of which is punishable under section 124-A or section 153-A or section 295-A of the Indian Penal Code, the High Court will refuse to set aside the order of forfeiture.

It has to be noticed that section 99-B in providing for relief to a person aggrieved by an order of forfeiture

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has limited the grounds on which relief can be applied for to one and one only, *viz.*, that the issue of the newspaper, or the book or other document, in respect of which the order was made, does not contain any seditious matter or other matter of such a nature as is referred to in sub-section (1) of section 99-A.

The appellant's contention that the High Court should also examine the notification to find out whether the government had stated the grounds of its own opinion as required by section 99-A and set aside the order of forfeiture if it finds that this requirement has not been fulfilled seeks to add an additional ground on which an application can be made under section 99-B and relief can be given by the High Court under section 99-D. The question is: Can that be done? It is well to recognise that just as a right of appeal is a creature of statute the right to apply for setting aside an order—which is really in the nature of an appeal—is equally a creature of statute and when the legislature creates such a right by a statute it may at its option make the right unlimited or may limit it in any manner it likes. It is settled law that no Court can add to or enlarge the grounds for appeal as laid down in the statute creating the appeal.

The position is exactly the same when the statute creates a right to seek relief by way of application and no court can add to the grounds on which relief can be sought if the statute creating the right to obtain relief is limited to one or more specified grounds. It is interesting to remember in this connection the right to apply for review granted by Order 47, rule 1, of the Code of Civil Procedure. After specifying some grounds on which a review can be applied for, the legislature added a further ground in the words "for any other sufficient reason". The proper interpretation of

these words "for any other sufficient reason" has engaged the anxious consideration of the courts and in 1922 the Privy Council after a review of the numerous cases laid down the rule that "for any other sufficient reason" means a reason sufficient on grounds at least analogous to those specified immediately previously. If the correct position had been that the court might add to the ground for a review whenever it thought fit, all the discussion as regards the interpretation of "for any other sufficient reason" would have been meaningless and unnecessary.

Indeed the position in law that the courts cannot add to the grounds to which the legislature has limited the right of relief is so very clear and unassailable that the learned counsel for the appellant did not like to suggest that a ground can be added. To overcome this difficulty that the courts cannot add to the grounds of relief specified in section 99-B and section 99-D, an ingenious argument has been put forward that in order that the High Court can give proper relief on the very ground mentioned in section 99-B and section 99-D it is essential that the government's order should state the grounds of its opinion. The steps of the argument may be shortly stated thus:—The government has formed an opinion. The High Court has to see that that opinion is correct. In order to do this the High Court must know what weighed with the government in coming to its opinion. Therefore, without the grounds of the government's opinion the High Court cannot be satisfied within the meaning of section 99-D that the issue of the newspaper contained the matter complained of.

The fallacy of this syllogistic process is in the unsoundness of the premises that in order to determine whether the government's opinion is correct or not the

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High Court must know what weighed with the government. When the application is heard by the High Court and it has to come to a conclusion whether it is or it is not satisfied that the issue of the newspaper, or the book or other document does contain a matter mentioned in section 99-A, the one and only way of coming to a conclusion appears to me to be to read the newspaper, or the book or other document. Arguments of counsel might be of assistance; if the government has stated its grounds for coming to its opinon, that would also help; but the ultimate responsibility of deciding whether or not to be satisfied that the issue of newspaper contains matters as mentioned in section 99-A can only be discharged by the High Court by reading the document in question.

It has been suggested that when section 99-B and section 99-D uses the words "any seditious or other matter of such a nature as is referred to in sub-section (1) of section 99-A", they mean only those matters on which the Government based the order of forfeiture; so it is urged, unless the Government stated the ground of its opinion, it will be impossible for the Court to decide the question under section 99-D.

I confess I do not think it reasonably possible to conceive of a case, where an order under section 99-A will not mention the particular matter referred to in section 99-A(1). The mention of the particular matter out of the several matters referred to in section 99-A which in its opinion is contained in the document does not however involve the statement of reasons for forming the opinion. Suppose a Government states that in its opinion the document contains seditious matters. It does not cease to be a complete statement on this point merely because the reasons for forming the opinion are not also stated. The formation of the opinion

that one or more of the matters referred to in the section are contained in a document and the statement that such an opinion has been formed are quite distinct from the statement of the reasons for forming the opinion. It appears to me clear that where, as in the present case the Government order contains a statement of the particular matter or matters out of the several matters, referred to in section 99-A, *viz.*, any seditious matter or any matter which promotes or is intended to promote feelings of enmity or hatred between different classes of the citizens of India or which is deliberately and maliciously intended to outrage the religious feelings of any such class by insulting the religion or the religious beliefs of that class, that is to say, any matter the publication of which is punishable under section 124-A or section 153-A or section 295-A of the Indian Penal Code" which in its opinion the document contains, no difficulty can possibly arise from the fact that the Court has not got before it Government's grounds for forming such opinion.

But, asks the appellant, why was it necessary then for the legislature to require in section 99-A that the Government should state the grounds of its opinion when notifying the order of forfeiture? The real reason, it is urged, was to enable the High Court to set aside the order of forfeiture if it was not satisfied of the propriety of those grounds, and necessarily also when no grounds were stated. If that were correct, it was reasonable to expect the legislature to make the necessary provision in section 99-B that an order could be challenged on the ground that the grounds of the opinion were not stated, and consequential provisions in section 99-D. I can see no justification for reading into these sections —section 99-A and section 99-D—words which are not there, in an attempt to understand why section 99-A contains such a requirement for statement of grounds

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of the opinion There can be no doubt that this is a very salutary provision that Government should record the grounds of its opinion. Such a provision diminishes the risk of Government making an arbitrary order of forfeiture. It was therefore a question of legislative policy for the legislature to require that the Government should state its opinion. To say that there could have been no reason for including such a requirement in section 99-A unless the legislature intended the High Court to interfere if grounds of the opinion were not stated, is, in my opinion, wholly unjustified

It seems clear to me that the duty cast by section 99-D on the judges of the High Court is not to see whether in a particular case the grounds stated by the government for forming its opinion are correct, but to see whether the opinion formed was correct. To perform this duty the one and the only way is to examine the document which in the Government's opinion contains the matter complained of.

The argument that the High Court is not in a position to perform this duty under section 99-D satisfactorily in the absence of a statement by the government of the grounds of its opinion appears to me therefore wholly unsound.

In this very case, the learned judges of the High Court of Allahabad felt no difficulty in coming to a conclusion on the question before them even though the government had not stated the grounds of its opinion. I fail to see any justification for imagining difficulties where there are none.

I have therefore come to the conclusion that the High Court was right in rejecting the argument that the order of forfeiture should be set aside on the ground that the notification did not state government's grounds for forming the opinion.

The appeal should therefore be dismissed.

BY THE COURT

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In view of the opinion of the majority, this appeal will be allowed and the order of the High Court, set aside. The appellant will be entitled to the return of all the books, documents and other things seized from him under the order now set aside. He will also be entitled to the refund of expenses and costs that he had to pay under the order of the High Court.

Appeal allowed.

SUPREME COURT

APPELLATE CIVIL

Before the Hon'ble Mr. Justice Gajendragadkar, the Hon'ble Mr. Justice Wanchoo, the Hon'ble Mr. Justice Das Gupta and the Hon'ble Mr. Justice Aiyar.

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April 27.

RANA SHEO AMBAR SINGH (APPELLANT)

v.

THE ALLAHABAD BANK LTD., ALLAHABAD (RESPONDENT)

[ON APPEAL FROM THE HIGH COURT AT ALLAHABAD]

Simple mortgage of villages by an Intermediary—*Consequences of vesting—Properties available in execution of mortgage decree, whether include : (a) Bhumidhari in sir, khudkasht and intermediary's grove. (b) wells, trees in abadi and buildings—Uttar Pradesh Zamindari Abolition and Land Reforms Act,* 1951, *ss.* 6(*a*)(i), 6(*h*), 8 *and* 18—*Transfer of Property Act,* 1882, *s.* 73.

In execution of a decree for the recovery of money due on a simple mortgage by the sale of the proprietary rights of the intermediary in the villages mortgaged in 1914 :

Held, (i) that the proprietary rights of the intermediary in *sir, khudkasht* and intermediary's groves vested after the requisite notification in the State of U. P. and the Bhumidhari tenure therein under s. 18 of the Act created by virtue of the cultivatory possession of such land is altogether a new right not covered by the mortgage and as such not available for the satisfaction of the mortgage decree.

(ii) (*obiter* and on concession) that the wells, trees in *abadi* and buildings apart from their site continue to belong to the intermediary and may be sold in execution of the mortgage decree.

Civil Appeal no. 301 of 1960, from the judgment and decree dated the 24th September, 1958, of the Allahabad High Court (Lucknow Bench) at Lucknow in First Execution of Decree Appeal no. 8 of 1958.

The facts appear in the judgment.

C. B. Agarwala, Senior Advocate (*Shanker Prasad* and *C. P. Lal*, Advocates, with him) for the appellant.

Sir Iqbal Ahmad, and *N. C. Chatterjee*, Senior Advocates (*D. N. Mukherjee* and *B. N. Ghosh*, Advocates, with them) for the respondent.

The following judgment of the Court was delivered by—

WANCHOO, J.:—This is an appeal on a certificate granted by the Allahabad High Court. The brief facts necessary for present purposes are these. The appellant's father Rana Umanath Bakshsingh was the Talukdar of Khajurgaon. On 18th July, 1914, Rana Umanath Bakshsingh executed a simple mortgage in favour of the Allahabad Bank Limited (hereinafter called the respondent). The mortgage was for a sum of Rs.6,00,000 and the property mortgaged consisted of sixty-seven villages. In May, 1924, the respondent filed a suit for the recovery of the balance of the unpaid mortgage money by the sale of the mortgaged property. In January, 1925, a preliminary decree for the recovery of rupees four lakhs and odd was passed, which was made final in July, 1926, and directed the sale of the mortgaged property, namely, the proprietary rights of Rana Umanath Bakshsingh in the sixty-seven villages. Then followed execution applications with which we are not concerned. In 1934, the U. P. Agriculturists' Relief Act was passed and thereupon an application was made by the judgment-debtor for the amendment of the decree under that Act. On 19th October, 1936, the decree was amended under the provisions of that Act and thereafter the pending execution proceedings were dropped as instalments had been fixed. Eventually, the respondent applied for execution on 25th May, 1940. Objection was taken to this application on the ground that it was barred by time; but this matter was decided against the judgment-debtor and thereafter the execution has been proceeding uptil now on this application.

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On 1st July, 1952, the U. P. Zamindari Abolition and Land Reforms Act, no. I of 1951 (hereinafter called the Act), came into force. As a consequence of this enactment, the zamindari rights of the judgment-debtor were abolished and it was no longer possible to sell these rights in the sixty-seven villages. Consequently, on 20th September, 1952, the respondent made an application that as the zamindari rights could not be sold, only such rights of the judgment-debtor as remained in him after the coming into force of the Act might be sold, namely, the rights in trees and wells in *abadi* and buildings situate in various villages under sale. It was also prayed that the judgment-debtor's proprietary rights in grove land and *sir* and khudkasht land had been continued under section 18 of the Act and these constituted substituted security in place of the proprietary rights mortgaged with the respondent and they should also be sold. Finally it was prayed that compensation money payable to the judgment-debtor on the acquisition of the proprietary rights by the State might be treated as substituted security.

The appellant objected to these applications on various grounds. The execution court held that the buildings, trees and wells situated in the *abadi* were liable to be sold in execution of the decree. It further held that the respondent was entitled to compensation amount granted by the State to the appellant in lieu of zamindari rights as substituted security. Finally, it held that the bhumidari rights acquired by the appellant under section 18 of the Act could also be sold in execution of the decree.

The appellant then took the matter in appeal to the High Court, and the two points urged before the High Court were (i) that the bhumidari rights created by section 18(1) of the Act could not be sold in execution of the decree, and (ii) that the application, dated 20th

September, 1952, was a fresh application for execution and as it was filed over 12 years after the date of the amended decree it was barred by time. The High Court repelled both these contentions, and held that execution could proceed against the bhumidari rights created in favour of the appellant under section 18 of the Act and further that the application dated 20th September, 1952, was within time as it was not a fresh application and the decree-holder was only seeking to execute the decree in respect of the property for the sale of which he had already applied within the time allowed by law. The High Court therefore dismissed the appeal. The appellant then obtained a certificate to appeal to this Court: and that is how the matter has come up before us.

The main point urged on behalf of the appellant is that the decision of the High Court that bhumidari rights created under section 18 of the Act can also be sold in execution of the decree, is not correct. Under the mortgage deed, the property mortgaged consisted of the property forming part of the Talukdari of Khajurgaon detailed at the foot of the mortgage, namely, the sixty-seven villages. Thus the mortgage consisted of the proprietary interests only of the mortgagor in the sixty-seven villages, and as it was a simple mortgage, possession of no part of the property was given to the mortgagee. It is therefore contended by Mr. Aggarwala on behalf of the appellant that as the proprietary right in the sixty-seven villages vested in the State under the Act, the respondent who was only entitled to get the proprietary rights sold under the mortgage can now fall back only on compensation payable to the appellant under the Act, and reliance in particular is placed on section 6(*h*) of the Act in this connection. On the other hand, the contention on behalf of the respondent is that bhumidari rights arising under section 18 of the Act are liable to be sold as

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they represented the proprietary rights which were mortgaged and in any case they can be sold as substituted security in place of the property mortgaged.'

We have therefore to look into the scheme of the Act in order to decide between the rival contentions. It is not in dispute that the Taluka of Khajurgaon was an estate within the meaning of the Act. It may be mentioned that the judgment-debtor had certain *sir* and khudkasht lands and zamindar's grove in the sixty-seven villages comprised within the Talukdari estate. Section 4 of the Act provides for vesting of an estate in the State on the making of a notification thereunder and the Taluka of Khajurgaon has vested in the State by virtue of such a notification made under section 4. Section 6 prescribes the consequences of the vesting arising under section 4 and we may refer to section 6(*a*)(i) as that will show in what the interests of the judgment-debtor ceased and became vested in the State :—

> "(*a*)—all rights, title and interest of all the intermediaries—
>
> (i) in every estate in such area including land (cultivable or barren), grove-land, forests whether within or outside village boundaries, trees (other than trees in village *abadi*, holding or grove), fisheries, tanks, ponds, water-channels, ferries, pathways, *abadi* sites, *hats*, *bazars* or *melas* [other than *hats*, *bazars*, *melas* held upon land to which clauses (*a*) to (*c*) of sub-section (1) of section 18 apply], and
>
> .....
>
> shall cease and be vested in the State of Uttar Pradesh free from all encumbrances."

Clause (*h*) of section 6 is also material and is in these terms :—

> "(*h*) no claim or liability enforceable or incurred before the date of vesting by or against such intermediary for any money, which is charged on or is secured by a mortgage of such estate or part thereof shall, except as provided in section 73 of the Transfer of Property Act, 1882, be enforceable against his interest in the estate."

All lands therefore whether cultivable or barren or grove lands vested in the State on the notification under section 4 having been made save as otherwise provided in this Act. Therefore, proprietary rights in *sir* and khudkasht land and grove land would vest in the State on the coming into force of the notification under section 4 unless there was some provision otherwise in the Act. The contention of the respondent therefore that *sir* and khudkasht land and grove land continued to be the property of the appellant and would therefore remain liable to be sold in execution proceedings would fail in view of the notification under section 4, unless of course there is a provision otherwise in the Act. The only provisions otherwise on which the respondent relies are sections 9 and 18 of the Act. So far as section 9 is concerned, it is certainly a provision otherwise and it provides as follows :

> "All wells or trees in *abadi*, and all buildings situate within the limits of an estate, belonging to or held by an intermediary or tenant or other person, whether residing in the village or not, shall continue to belong to or be held by such intermediary, tenant or person, as the case may be, and the site of the wells or the buildings with the area appurtenant thereto shall be deemed to be settled with him by the State Government on such terms and conditions as may be prescribed."

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This provision clearly creates an exception to the property which vests in the State on the making of a notification under section 4. The exception is in favour of all wells and trees in *abadi* and all buildings and it is significant to note that these things will continue to belong to the intermediary, though the further provision shows that the site of the wells, and buildings with the area appurtenant thereto would vest in the Government and would be deemed to be settled with the intermediary on such conditions and terms as may be prescribed. The effect therefore of section 9 is that wells, trees in *abadi* and buildings apart from the land under them continue to belong to the intermediary (and the appellant is undoubtedly an intermediary within the meaning of the Act); but even here the land on which the buildings and the wells stand vest in the State and it is deemed settled with the intermediary on terms and conditions to be prescribed. So far therefore as wells and trees in *abadi* and all buildings are concerned, these continue to belong to the appellant and if they are covered by the mortgage they would be liable to sale. As we have already pointed out, there was no dispute before the High Court with respect to wells, and trees in *abadi* and buildings and it was conceded there that these were liable to be sold, the only dispute being with respect to bhumidari rights created under section 18.

Let us now turn to section 18 and see whether it is also a provision otherwise like section 9. The relevant part of section 18 for our purposes is in these terms :

> "(1) Subject to the provisions of sections 10, 15, 16 and 17, all lands—
>
> (*a*) in possession of or held or deemed to be held by an intermediary as *sir*, khudkasht or an intermediary's grove,
>
> .....

on the date immediately preceding the date of vesting shall be deemed to be settled by the State Government with such intermediary, lessee, or tenant, grantee or grove-holder, as the case may be, who shall subject to the provisions of this Act be entitled to take or retain possession as a bhumidar thereof."

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It is well to contrast the language of this section with the language of section 9. Section 9 lays down that trees and wells in *abadi* and buildings shall continue to belong to the intermediary and that shows that it was a provision otherwise excepting these three items from vesting in the State by virtue of the notification under section 4 and its consequence under section 6; but there is no provision in section 18 of the Act to the effect that *sir* and khudkasht land and intermediary's grove shall continue to belong to the intermediary. Therefore, *sir* and khudkasht land and grove land would vest in the State by virtue of section 6(*a*)(*i*) for there is no provision otherwise in section 18 in that behalf. In this connection we may refer for comparison to section 23 of the Rajasthan Land Reforms and Resumption of Jagirs Act, no VI of 1952 (hereinafter called the Rajasthan Act) which provides that "notwithstanding anything contained in the last preceding section (*i.e.*, section 22, which refers to *consequences of resumption*), all khudkasht lands of a Jagirdar, etc., shall continue to belong to or be held by such jagirdar or other person". If the intention of the Act was not to vest *sir* and khudkasht land and grove land in the State we would have found an exception similar to that found in the Rajasthan Act. Section 9 itself shows in what manner the Legislature was making an exception when it did not intend that a particular property should vest in the State. If the intention were that *sir* and khudkasht land and grove land should not vest in the State, section 18 would have been worded in the same

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way as section 9. Further the way in which section 18 is worded, (namely that khudkasht and *sir* land and an intermediary's grove shall be deemed to be settled with the intermediary and he would have bhumidari rights therein) shows that these three kinds of property vested in the State under section 6(*a*)(*i*) and were then resettled with the intermediary on a new tenure and not in the same right, which he had in them before the vesting. The Legislature was therefore creating a new right under section 18 and the old proprietary right in *sir* and khudkasht land and any intermediary's grove land had already vested under section 6 in the State. Therefore, it cannot be said that section 18 is an exception to the consequences provided in section 6 and therefore *sir* and khudkasht land and grove land continue to be the property of the judgment-debtor in this case in the same manner as they were his property at the time of the mortgage and would therefore be available in execution of the decree as the proprietary rights mortgaged. We are of opinion that the proprietary rights in *sir* and khudkasht land and in grove land have vested in the State and what is conferred on the intermediary by section 18 is a new right altogether which he never had and which could not therefore have been mortgaged in 1914.

Our attention in this connection was drawn to the compensation sections in the Act, and it was urged that what was given to the intermediary under section 18 was really his old right because no compensation was to be paid to him with respect to what was left to him under section 18. The first section to be considered in this connection is section 39 which deals with gross assets of a *mahal*. In these gross assets the amount computed at the rates applicable to the ex-proprietary tenants of similar land for land in the personal cultivation of or held as intermediary's grove, khudkasht

or *sir* by all the intermediaries in the estate was to be included subject to certain exceptions which are immaterial for our purposes. The very fact that in the gross assets the rents of these lands in which the bhumidari rights were created under section 18 were taken into consideration shows that these lands also vested in the State; if that were not so there was no necessity for including these assets in the gross assets for the purposes of compensation. Here again we may refer to a similar provision in the Rajasthan Act for purposes of comparison. The second Schedule to that Act provides how gross income is to be calculated and in calculating the gross income the income from khudkashat land has not been taken into account because it was excepted from the consequence of resumption under section 28 of that Act. It is true that under section 44 of the Act when calculating net assets, the income from *sir* and khudkasht land and grove land has been excluded on the ground that bhumidari rights have been conferred therein under section 18 of the Act. That is however for the purposes of calculating what should be paid to the intermediary as compensation and in that connection it was necessary to take into account the fact that the Legislature was creating a new right in the intermediary with respect to certain lands and therefore it was not necessary to give money as compensation. That would not however make any difference in our view as to the legal effect of the notification under section 4 and under the notification *sir* and khudkasht land and grove land would vest in the State and would not be an exception to the consequences of vesting in section 6 and therefore the proprietary right in *sir* and khudkasht land and grove land which were mortgaged would be extinguished and the bhumidari right which is created by section 18 would be a new right altogether and would not therefore be considered to be included under the mortgage in this case.

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This brings us to a consideration of section 6(*h*) of the Act. That lays down that "no claim or liability enforceable or incurred before the date of vesting by or against such intermediary for any money, which is charged on or is secured by a mortgage of such estate or part thereof shall, except as provided in section 73 of the Transfer of Property Act, 1882, be enforceable against his interest in the estate". This provision has in our opinion a two-fold effect. In the first place, it makes it impossible for the mortgagee to follow the proprietary right after it vests in the State. Secondly, it provides that the only way in which the mortgagee can recover his money advanced on the security of the property which vested in the State by virtue of the notification under section 4 and the consequences thereof under section 6 is to follow the procedure under section 73 of the Transfer of the Property Act. Section 73(2) provides that "where the mortgaged property or any part thereof or any interest therein is acquired under the Land Acquisition Act, 1894 (I of 1894), or any other enactment for the time being in force providing for the compulsory acquisition of immovable property, the mortgagee shall be entitled to claim payment of the mortgage money, in whole or in part, out of the amount due to the mortgagor as compensation". There is no doubt that the property mortgaged has been compulsorily acquired in this case by the State under the Act. Therefore, section 6(*h*) read with section 73 directs that the mortgagee shall proceed in the manner provided in section 73, namely, follow the compensation money, and there is no other way possible for him in view of section 6(*h*) with respect to the property which has been acquired under the Act. We have held that *sir* and khudkasht land and grove land have been acquired under the Act and have vested in the State; therefore the mortgagee is relegated to enforce his rights against the mortgagor in the manner

provided in section 73 of the Transfer of Property Act and in no other way. What we say here does not affect that property which is not acquired by the State, for example, property excepted under section 9 of the Act: but where the property has vested in the State by virtue of a notification under section 4 and its consequences under section 6, the only course open to the mortgagee is to follow the compensation money under section 6 (*h*). The bhumidari rights created under section 18 are not compensation; they are special rights conferred on the intermediary by virtue of his cultivatory possession of the lands comprised therein. The respondent therefore cannot enforce his rights under the mortgage by sale of the bhumidari rights created in favour of the appellant under section 18 so far as his *sir* and khudkasht land and grove land are concerned: it can only follow the compensation money as provided in section 6(*h*). The argument that bhumidari rights can be followed as substituted security must therefore equally fail.

Our attention in this connection was drawn to section 8(2) of the U. P. Zamindari Debt Reduction Act, no. XV of 1953. That Act provides for scaling down of debts of zamindars whose estates have been acquired under the Act. It also provides that the debts due shall be realisable from the compensation and rehabilitation grant, and in particular section 8(2) provides that "notwithstanding anything in any law the reduced amount found in the case of a mortgagor or judgment-debtor as the case may be, under section 3 or 4 as respects mortgaged estates shall not be legally recoverable otherwise than out of the compensation and rehabilitation grant payable to such mortgagor or judgment-debtor in respect of such estates". We have not been able to understand how the provisions of the U. P. Zamindars Debt Reduction Act can effect the construction of section 6(*h*) of the Act read with other provisions of the

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Act. It is not necessary for us therefore to construe section 8(2) of the U. P. Zamindars Debt Reduction Act, for we are clear on the provisions of section 6(*h*) and the other provisions of the Act that bhumidari rights created in favour of the appellant cannot be sold in execution of the decree held against him by the respondent under the mortgage of 1914.

This brings us to the question of limitation. *Mr. Aggarwala* conceded that if the appellant succeeds on the first point it would not be necessary for us to consider the question of limitation. Therefore, as the appellant succeeds on the first point we need not consider whether the application for execution by sale of bhumidari rights created under section 18 is barred by limitation.

We therefore allow the appeal and direct that the execution of the decree by the respondent will not be levied against the bhumidari rights created in favour of the appellant under section 18 of the Act. The appellant will get his costs of this Court and of the High Court Costs of the execution court will be at the discretion of that Court.

Appeal allowed.

SUPREME COURT

APPELLATE CIVIL

Before the Hon'ble The Chief Justice Mr. Bhuvaneshwar Prasad Sinha, the Hon'ble Mr. Justice Subba Rao, the Hon'ble Mr. Justice Dayal and the Hon'ble Mr. Justice Mudholkar.

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May, 4

HARI SHANKER LAL (APPELLANT)

v.

SHAMBHU NATH AND OTHERS (RESPONDENTS)

[ON APPEAL FROM THE HIGH COURT AT ALLAHABAD]

Arbitration—*Reference of dispute for decision by—Time within which award must be filed—Computation of—Arbitration Act,* 1940, *ss.* 3, *and* 28, *First Sch. r.* 3.

Rule 3 of the First Schedule to the Arbitration Act, by virtue of s. 3 and in the absence of a different intention expressed in the arbitration agreement, limits the time within which the award must be made by the arbitrators.

(Per majority) The second alternative viz. "The arbitrators shall make their award within four months . . . after having been called upon to act by notice in writing by any party to the arbitration agreement . . . ." can be invoked in a case where notice to act has been given to the arbitrators. Such a notice may be given (i) either before they entered on the reference, or (ii) even after but within four months from the date they entered on the reference. The period of four months would, in the former, be computed from the date of entering on the reference and, in the latter, from the date of notice to act. A notice to act need, obviously, be given only when an arbitrator is not acting i.e. he has refused or neglected to discharge his duty. The court has in every case, the power to extend the time even though the award has been factually made beyond the prescribed time.

(*Per* DAYAL, J.)—The period of four months in question is to run from the date of the arbitrators entering on the reference or from the date of the notice to act. R. 3 does not contemplate of a notice on the arbitrators to act after they once enter on the reference and the period of four months cannot be computed from or extended by such notice.

Case-law discussed.

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Hari Shankar Lal v. Shivram Nath

Civil Appeal no. 219 of 1958, from the judgment and decree dated the 5th January, 1954, of the Allahabad High Court, in First Appeal From Order no. 353 of 1953.

The facts appear in the judgments.

S. K. Kapur and *Ganpat Rai, Advocates* for the appellant.

A. N. Goyal, Advocate, for respondents nos. 1 and 2.

The following judgments of the Court were delivered—

SUBBA RAO, J.:—This appeal by certificate raises a question of construction of rule 3 of the First Schedule to the Arbitration Act, 1940 (10 of 1940) (hereinafter referred to as the Act).

The facts material to the question raised may be briefly stated. The appellant and respondents 1 and 2 are brothers. On 17th August, 1948, the appellant and respondents 1 and 2 and their mother by a registered deed of agreement referred their dispute regarding the partition of two houses in the city of Banaras to two arbitrators, respondents 3 and 4. Within 10 days of the reference, the said arbitrators gave notice to the parties and began to take evidence i.e., they entered on the reference. On 25th July, 1949, Rajwanti, the mother of the appellant and respondents 1 and 2 died, and the arbitrators did not proceed with the inquiry. On 31st August, 1950, i.e., more than one year after the death of Rajwanti, the appellant gave a notice to the arbitrators requesting them to proceed with the reference and give the award at an early date. On 1st October, 1950, i.e. within 4 months from the date of the notice, the arbitrators made an award and it was duly registered. On 23rd January, 1951, the appellant filed an application under sections 14(2) and

17 of the Act in the Court of Civil Judge, Banaras, praying that the said award be filed and be made a rule of the court. The said application was registered as a suit; the appellant was placed in the position of plaintiff and the respondents in that of defendants. The respondents raised various objections to the said application: one of the objections, with which only we are now concerned, was that the award was not given within the time fixed by law. The learned Civil Judge rejected the objections and made a decree in terms of the award. On appeal, the High Court came to the conclusion that the award was made after the expiry of the period of limitation, and on that finding set aside the decree of the learned Civil Judge and dismissed the suit with costs. Hence this appeal.

Learned counsel for the appellant contends that rule 3 of the First Schedule to the Act provides for alternative periods within which arbitrators have to make their award, that under the second alternative an award could be made within 4 months from the date of notice issued by a party calling upon the arbitrators to act, and that, as in the present case the notice to act was given by the appellant to the arbitrators on 31st August, 1950, the award made by them on 3rd October, 1950, was within the time prescribed.

The answer to the question raised turns upon the true meaning of the provisions of rule 3 of the First Schedule to the Act. It will be convenient at the outset to read the relevant provisions of the Act.

Section 3 of the Act reads:

> "An arbitration agreement, unless a different intention is expressed therein, shall be deemed to include the provisions set out in the First Schedule in so far as they are applicable to the reference."

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Rule 3 of the First Schedule to the Act is as follows:

> "The arbitrators shall make their award within four months after entering on the reference or after having been called upon to act by notice in writing from any party to the arbitration agreement or within such extended time as the Court may allow."

Section 28 says:

> "(1) The Court may, if it thinks fit, whether the time for making the award has expired or not and whether the award has been made or not, enlarge from time to time the time for making the award."

Section 3 of the Act means the period prescribed in the First Schedule for making an award a term of the arbitration agreement. Rule 3 of the First Schedule to the Act is couched in a mandatory form and it imposes a duty on the arbitrators to make their award within one or other of the three alternative periods mentioned therein. The first construction suggested by learned counsel for respondents is that the words "entering on the reference" in the first clause of the rule and the words "to act" in the second clause thereof are synonymous and they mean the same thing. This would make the second alternative unnecessary in many cases, for if the words "to act" means "to enter on the reference" there is no need for fixing two separate periods; for, on that construction, notice would always precede the act of entering on the reference and, therefore, the first alternative would serve the purpose. On that construction, the only purpose it serves is that a party may force the pace by calling upon the arbitrators, who are delaying to enter on the reference, to act expeditiously. If the Legislature intended to give such a limited scope to the said rule it would not have used two different sets of words in the two alternative

clauses and different starting points for computing the period of four months. The word "act" is certainly more comprehensive than the words "enter on the reference". The distinction between the said two sets of words has been brought out with clarity in *Baring-Goulc v. Sharpington Combined Pick and Shovel Syndicate* (1). There, on 11th January, 1898, one of the parties served on the arbitrators a notice in writing addressed to both the arbitrators requiring them to appoint an umpire; on 15th February, 1898, the arbitrators appointed an umpire; the arbitrators did not make any award, but on 30th April, 1898, the umpire made his award; it was contended that by the notice requiring the arbitrators to appoint an umpire, they had not been "called on to act" within the meaning of Schedule I (*c*), to the Arbitration Act, 1898, and consequently the three months within which the arbitrators were required by that clause to make their award had not expired, and the jurisdiction of the umpire had not arisen and his award was invalid. In that context it became necessary to decide what the words "called on to act" mean and whether they were synonymous with the words "called on to enter on the reference". Lindley, M.R., adverting to that contention observed at p. 91:

> "The three months are to run first 'after entering on the reference'; and then, in the alternative, after 'having been called on to act' . . . . If they are 'called on to act' as arbitrators, it must mean that they are called on to do an act as arbitrators. It appears to me that these arbitrators were 'called on to act' by the notice to appoint an umpire; and there was very good reason for making the period of three months run from that time. If the arbitrators do not 'enter on the reference', and they are 'called on to act', it is an intimation

(1) (1898) 2 Ch. D. 80.

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to them that they are called on to do the work. I cannot agree with STIRLING, J. that 'called on to act' means 'called upon to enter on the reference'. Being called on to do anything as an arbitrator is being called on to act. That the appointing of an umpire is an act done by the arbitrators as arbitrators is obvious. To do that which they could only do in the character of arbitrators is, in my judgment, clearly within the words, and I think it is within the sense of the expression used in clause (c)."

No doubt in the above case, unlike in the present case, the arbitrators were called on to act before they entered on the reference; but that cannot make any difference in the application of the principle, namely, that "to act" is not the same as "to enter on the reference", and that the former is of a wider import than the latter. The Allahabad High Court, in *Sardar Mal Hardat Rai* v. *Sheo Bakhsh Rai Sri Narain* (1), had to consider the scope of rule 3 of the First Schedule to the Act in a different context. There, on 14th January, 1919, a dispute had been referred to arbitrators; the award was made on 23rd August, 1919; it was contended that the award had not been made within three months after the arbitrators entered on the reference, nor was it made within three months after having been called upon to act by notice in writing by one of the parties to the submission. PIGGOTT and WALSH, JJ., held that the two clauses were alternative in the sense that when no reference was entered upon at all then the time ran from the notice calling upon the arbitrators to act, and that if they had entered on the reference, they had three months from that moment for making their award. In that case, the notice to act was given before the arbitrators entered upon the reference, and as the award was made within the prescribed

(1) (1922) I.L.R. 44 All. 482

time from the date of entering upon the reference, though beyond the prescribed time from the notice asking the arbitrators to act, they held that the award was within time on the basis of the second alternative. In neither of the two cases the question that now falls to be considered had directly arisen, namely, whether, if the notice to act was given subsequent to the arbitrators entering on the reference, the period should be computed from the former date or from the latter date. That question arises in this case.

The said discussion leads us to the conclusion that though entering on the reference is an act of the arbitrators, that is not exhaustive of the content of the word "act" in the second alternative

But this wide construction, without limitation, would defeat the purpose of rule 3. The object of the rule is to prescribe a time limit in the interest of expeditious disposal of arbitration proceedings. If under the second alternative notice to act can be given at any time, it would enable one of the parties to enlarge the period of time prescribed indefinitely: not only the time limit prescribed would become meaningless but one of the parties could also, without the consent of the other, resuscitate a dead or stale reference This could not have been the intention of the Legislature and, therefore, a reasonable construction should be placed upon the provision. Such a limitation on the right of a party to reopen an abandoned reference is implicit in the words "to act". A party can ask the arbitrator to act if he is legally bound to act under the reference. If after the expiry of four months from the date of entering on the reference an arbitrator can no longer act, a notice given thereafter cannot ask him to act. Realizing this difficulty, learned counsel for the respondents suggests that an arbitrator can act even after four months, though the award cannot be filed with-

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out getting an extension of time from the court. But the relevant provisions do not support this contention. The third alternative in rule 3 shows that an award can be made within the extended time allowed by the Court. Section 28 of the Act enables the court to extend the time for the making of the award; extension of time may be given even after the award has been factually made. So till the time is extended an award cannot be made, though, when extended, the award factually made may be treated as an award made within the time so extended. To put it differently, if time was not extended by court, the document described as an award would be treated as *non est*. In this view, the second alternative in rule 3 can be invoked only in a case where a notice to act has been given to the arbitrators either before the arbitrators entered on the reference or after they have entered on the reference but before the period of four months from that date has run out.

It is said that this construction also may start off a chain of notices which may lead to the same result sought to be avoided by it. The argument is that if one of the parties gives a notice to act, it gives the arbitrators 4 months from that date to act and if before the expiry of the 4 months from that date of notice another notice is given, they will get another lease of life and so on indefinitely. Though there is some plausibility in the criticism, it is answered by our confining the right to give notice by a party to the period of four months from the date the arbitrators entered upon the reference. Nor the apprehension that a party may go on giving number of notices to act within the said 4 months from the date of the arbitrators entering upon the reference, each notice giving a fresh period of 4 months, has any basis. A notice to act can only be given when an arbitrator is not acting i.e., he has refused or neglected to discharge his duty. Therefore,

every notice, cannot give a fresh period unless in fact the arbitrators refused or neglected to act before such notice is given. The legal position may be formulated thus: (*a*) A notice to act may be given before or after the arbitrators entered upon the reference. (*b*) If notice to act is given before they entered upon the reference, the four months would be computed from the date they entered upon the reference. (*c*) If a party gives notice to act within 4 months after the arbitrators entered upon the reference, the arbitrators can make an award within 4 months from the date of such notice. And (*d*) in that event, after the expiry of the said 4 months the arbitrators become *functus officio*, unless the period is extended by court under section 28 of the Act; such period may also be extended by the court, though the award has been factually made.

In the present case, the notice was given long after the expiry of four months from the date when the arbitrators entered on the reference and, therefore, they could no longer act pursuant to the notice calling upon them to act. The proper course should have been to apply to the court for extension of time under section 28 of the Act. We, therefore, agree with the conclusion arrived at by the High Court, though on different grounds.

In the result, the appeal fails and is dismissed with costs.

RAGHUBAR DAYAL, J.:—I agree with the order proposed, but for different reasons, which I now state.

The period of four months under rule 3 of the First Schedule to the Arbitration Act is to run from the date of the arbitrators entering on the reference or from the date on which they have been called upon to act by notice in writing from any party to the arbitration agreement. If the arbitrators have entered upon the reference, the period of four months begins to run from the date they entered on the reference

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Any notice subsequently given to them calling upon them to act will not make the period of four months start afresh from the date of the service of the notice. Such a notice would be ineffective for the purposes of determining the period of four months within which the arbitrators had to make the award. In fact, there would be no valid occasion for giving such a notice subsequent to the arbitrators entering on the reference. Parties cannot prompt them for conducting their enquiry or taking steps in connection with the enquiry. Even if they do, in case the arbitrators were lethargic, such a notice is not contemplated by rule 3 of the First Schedule.

A case may possibly arise when an arbitrator, by his conduct, indicates that he refuses to act and it becomes necessary for a party to give notice to the other arbitrator to appoint another person arbitrator in his place. The appointment of arbitrators, would be complete after the fresh arbitrator has been appointed. The proceedings taken previously would have come to an end as infructuous. The period of four months, therefore, would start in accordance with the provisions of rule 3 of the First Schedule and not from the date on which any party had called upon the remaining arbitrators to appoint an arbitrator in the place of one who had refused to act. Sections 8 and 9 of the Arbitration Act provide for the appointment of an arbitrator by the Court in place of such defaulting arbitrator.

The view that the fresh period of limitation will begin to start from the date of the notice if it be served within the period of four months which had begun to run from the date on which the arbitrators entered on the reference, would mean that any of the parties will be able to extend the period by just giving a notice, to the arbitrators within the original period of four months. Such an effect of a unilateral notice could not have been intended by the Legislature. If one can extend

the time—the original period of four months—by giving a notice within that period, there is no reason why another fresh period of four months should not start by the giving of a second notice to the arbitrators to act, before the expiry of the period extended by the first notice. If this be possible, the period for making the award can be extended without any limit by any of the parties. This is what must have been in the mind of Lindley, M. R., in *Baring-Gould's Case* (1) when he said :

> "The arbitrators have three months within which to make their award, and the umpire has another month after the expiration of those three months. Every one agrees, although the enactment does not expressly say so, that the time from which the three months are to be reckoned is the first of the two periods mentioned, and not the last. If it were the last, the proceedings might be very unreasonably postponed."

The enactment under consideration there, is to be found quoted at the bottom of page 86 and, but for the period of three months instead of four months, is in identical terms with those of rule 3 of the First Schedule.

In the present case, the arbitrators did enter on the reference by the end of August, 1948 and therefore the award made on 3rd October, 1950, was made beyond the period of four months of the arbitrators' entering on the reference, and was therefore made when the arbitrators had no jurisdiction to make it.

In this view, it is not necessary to consider whether the notice to act, served after the period of four months had expired, is a good notice or not, or whether the arbitrators are competent to act in expectation of getting the time extended by the Court or not. I am, however, inclined to the view that in view of the

(1) [1899] 2 Ch. D. 80, 91.

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Raghubar Daval, J.

provisions of section 28, it is not possible to say that the arbitrators are not competent to act after the expiry of the period of four months from the date of their entering on the reference. The provisions of this section contemplate the arbitrators having made the award beyond the period of limitation without having previously obtained the order of the Court extending the time of making the award. This implies that the arbitrators would have carried on their proceedings and would have made the award subsequent to the expiry of the period during which they should have made the award. The competency of the arbitrators to act in pursuance of the reference arises out of the reference made by the parties and is not dependent on the period during which they ought to make the award. So long as the power vested in them to decide the dispute between the parties is not withdrawn, they continue to be competent to act on the reference in expectation that the period for making the award would be extended by the Court.

I also do not consider it necessary to decide in this case as to when arbitrators can be said to enter on the reference or what is meant by 'their being called upon to act' by notice under rule 3 of the First Schedule. I simply note that I agree with the view expressed in *Iossifoglu* v. *Coumantaros* (1) that arbitrators enter upon a reference as soon as they have accepted their appointment and have communicated with each other about the reference. This is a stage earlier than their starting the proceedings in the presence of the parties or under some peremptory order compelling them to conclude the hearing *ex parte*. 'Calling upon the arbitrators to act' does include asking the arbitrators to enter on the reference, but may also include asking them to do anything in connection with the reference except asking them to do the routine acts connected with the enquiry.

Appeal dismissed.

(1) [1941] 1 K.B. 396.

SUPREME COURT

APPELLATE CIVIL

Before the Hon'ble the Chief Justice Mr. Bhuvaneshwar Prasad Sinha, the Hon'ble Mr. Justice Subba Rao, the Hon'ble Mr. Justice Dayal and the Hon'ble Mr. Justice Mudholkar.

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May, 4

HIRA LAL PATNI (APPELLANT)

v.

SRI KALI NATH (RESPONDENT)

Jurisdiction of Civil Courts—*Want of local jurisdiction—Waiver of objection to or acquiescence in exercise of jurisdiction—Effect of, on the validity or executability of decree passed—Code of Civil Procedure,* 1908, *ss.* 21, 47 *and* 151.

It is well settled that the want of local jurisdiction in a civil court does not stand on the same footing as the want of inherent jurisdiction i.e. where the court is not at all competent to try the case. The former though not the latter is curable by consent or waiver.

Accordingly, where the court does not suffer from want of inherent jurisdiction but simply for want of territorial jurisdiction arising from the fact that the entire cause of action arose outside the local limits of its jurisdiction and the defendant does not object to the suit being referred for decision to the arbitrator, he is estopped from subsequently challenging the jurisdiction of the court to entertain the suit or to refer it for arbitration or the award itself.

Ledgard v. *Bull* (1) distinguished.

Civil Appeal no. 237 of 1958, from the judgment and decree dated the 27th January, 1955, of the Allahabad High Court, in Execution First Appeal No. 137 of 1954.

The facts appear in the judgment.

Vishwanatha Sastri, Senior Advocate (*E. Udayarathnam* and *S. S. Shukla*, Advocates, with him) for the appellant.

Vijya Sagar, Advocate for the respondent.

The following Judgment of the Court was delivered by—

SINHA, C.J.:—This appeal, on a certificate by the High Court of Judicature at Allahabad, arises in exe-

(1) (1887) L.R. 13 I.A. 134.

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Sinha, C. J.

cution proceedings, taken by the decree holder—respondent, in the following circumstances. The appellant wished to acquire shares in certain mills, popularly known as 'John Mills', at Agra. He engaged the services of the respondent to negotiate the deal on certain terms. The bargain was concluded, and the appellant, together with another person, purchased the entire interest of one Major A. U. John by an indenture of sale dated 10th July, 1946. The respondent instituted a suit, being suit No. 3718 of 1947, on the original side of the High Court of Judicature at Bombay for recovery of his commission, amounting to one *lakh* of rupees, in respect of the transaction aforesaid.

The suit was eventually referred to the arbitration of one Mr. W. E. Pereira, administrator of the estate of the aforesaid Major A. U. John, deceased. One of the defences taken by the appellant, as defendant in the action, was that the suit filed in the Bombay High Court, as aforesaid, after obtaining leave of that Court under clause 12 of the Letters Patent, was outside the territorial jurisdiction of the Bombay High Court on the original side, inasmuch as the entire cause of action, if any, had arisen at Agra. The arbitrator gave an award in favour of the respondent to the extent of decreeing his claim for only seventy five thousand rupees as commission, with interest at 6 per cent per annum *pendente lite*. Proceedings were taken in the High Court of Bombay for setting aside the award on certain grounds, not necessary to be stated here. The Bombay High Court found that there was no defect in the award and that there was no legal misconduct on the part of the arbitrator. The High Court further held that the petition was frivolous, and dismissed it with costs. The appellant preferred an appeal which was dismissed by a Division Bench of the High Court of Bombay on 21st January, 1952. The award was, thus, incorporated in a decree of the High Court. That decree was transferred to the Court of the

District Judge, Agra, for execution. On 5th February, 1952 the execution proceedings were instituted by the decree holder in the Court of the Civil Judge, Agra, to realise the sum of one *lakh* ten thousand rupees, approximately, on the basis of the decree passed as aforesaid by the Bombay High Court.

The appellant, as judgment-debtor, put in an objection under sections 47 and 151 of the Code of Civil Procedure, objecting to the execution of the decree on a number of grounds, of which it is only necessary to notice the one challenging the jurisdiction of the High Court to entertain the suit and to make the award a decree of Court. It was contended that the Bombay High Court had no jurisdiction to entertain the suit as no part of the cause of action ever arose within the territorial jurisdiction of that Court, and that, therefore, all the proceedings following thereupon were wholly without jurisdiction. The learned Execution Judge, by his judgment and order dated 3rd April, 1954 dismissed the objection petition with costs. The appellant then preferred an appeal to the High Court of Judicature at Allahabad against the aforesaid judgment and order of the Executing Court. The appeal, being Execution First Appeal No. 137 of 1954, was ultimately dismissed by a Division Bench of the Allahabad High Court, by its judgment dated 27th January, 1955. The judgment debtor-appellant moved the High Court and obtained the necessary certificate that the case was a fit one for appeal to this Court; and that is how the matter is before us.

The only ground on which the decision of the High Court is challenged is that the suit instituted on the original side of the Bombay High Court was wholly incompetent for want of territorial jurisdiction and that, therefore, the award that followed on the reference between the parties and the decree of Court, under execution, were all null and void. Strong reliance was placed upon the decision of the Privy Council in the case of *Ledgard* v. *Bull* (1). In our opinion, there is no substance in this

(1) (1886) 13 I.A. 134.

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contention. There was no inherent lack of jurisdiction in the Bombay High Court where the suit instituted by the plaintiff-decree-holder. The plaint had been filed after obtaining the necessary leave of the High Court under clause 12 of the Letters Patent. Whether the leave obtained had been rightly obtained or wrongly obtained is not a matter which can be agitated at the execution stage. The validity of a decree can be challenged in execution proceedings only on the ground that the court which passed the decree was lacking in inherent jurisdiction in the sense that it could not have seizin of the case because the subject matter was wholly foreign to its jurisdiction or that the defendant was dead at the time the suit had been instituted or decree passed, or some such other ground which could have the effect of rendering the court entirely lacking in jurisdiction in respect of the subject matter of the suit or over the parties to it. But in the instant case there was no such inherent lack of jurisdiction. The decision of the Privy Council in the case of *Ledgard* v. *Bull* (1) is an authority for the proposition that consent or waiver can cure defect of jurisdiction but cannot cure inherent lack of jurisdiction. In that case, the suit had been instituted in the court of the Subordinate Judge, who was incompetent to try it. By consent of the parties, the case was transferred to the court of the District Judge for convenience of trial. It was laid down by the Privy Council that as the court in which the suit had been originally instituted was entirely lacking in jurisdiction, in the sense that it was incompetent to try it, whatever happened subsequently was null and void because consent of parties could not operate to confer jurisdiction on a court which was incompetent to try the suit. That decision has no relevance to a case like the present where there could be no question of inherent lack of jurisdiction in the sense that the Bombay High Court was incompetent to try a suit of that kind. The objection to its territorial juris-

(1) (1886) L.R. 13 I.A. 134.

diction is one which does not go to the competence of the court and can, therefore, be waived. In the instant case, when the plaintiff obtained the leave of the Bombay High Court on the original side, under clause 12 of the Letters Patent, the correctness of the procedure or of the order granting the leave could be questioned by the defendant or the objection could be waived by him. When he agreed to refer the matter to arbitration through court, he would be deemed to have waived his objection to the territorial jurisdiction of the court, raised by him in his written statement. It is well settled that the objection as to local jurisdiction of a court does not stand on the same footing as an objection to the competence of a court to try a case. Competence of a court to try a case goes to the very root of the jurisdiction, and where it is lacking, it is a case of inherent lack of jurisdiction. On the other hand, an objection as to the local jurisdiction of a court can be waived and this principle has been given a statutory recognition by enactments like section 21 of the Code of Civil Procedure. Having consented to have the controversy between the parties resolved by reference to arbitration through court, the defendant deprived himself of the right to question the authority of the court to refer the matter to arbitration or of the arbitrator to render the award. It is clear, therefore, that the defendant is estopped from challenging the jurisdiction of the Bombay High Court to entertain the suit and to make the reference to the arbitrator. He is equally estopped from challenging the authority of the arbitrator to render the award. In our opinion, this conclusion is sufficient to dispose of the appeal. It is not, therefore, necessary to determine the other points in controversy, including the question whether The Decrees and Orders Validating Act, 1936 (Act V of 1936) had the effect of validating what otherwise may have been invalid

The appeal is accordingly dismissed with costs.

Appeal dismissed.

CIVIL REVISION

Before Mr. Justice Mithan Lal.

DEBA NAND NAUTHANI (APPLICANT)

v.

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July, 25

JAYANAND AND OTHERS (OPPOSITE-PARTIES)

Code of Civil Procedure, 1908 s. 152—*Application for amendment of decree—Decree affirmed in appeal—Merger of decree —Which court has power to amend the decree.*

Held, the proper court for making the application under s. 152 in cases when an appeal has been decided on merits and the decree of the lower court has merged into the appellate decree, would be the appellate court and not the trial court.

Once a decree is affirmed by the High Court it merges into the decree of the High Court and it is no longer open to the lower court to vary that decree by way of review.

Chintamani v. *Debi Prasad* (1) not followed, *Muhammad Sulaiman Khan* v. *Yar Khan* (2), *Brij Narain* v. *Tejbal Bikram Bahadur* (3) and *Hussain Sab* v. *Sitaram Vighneshwar* (4), *State of U. P.* v. *Mohammad Nooh* (5), *Commissioner of Income-tax* v. *Amrit Lal Bhogilal Co.* (6) and *Sitaram Goel* v. *Municipal Board, Kanpur* (7) relied on.

Civil Revision no. 307 of 1957, against the order of R. B. Khandwal, Munsif Pauri Garhwal dated 6th November, 1956.

The facts appear in the judgment.

N. D. Pant, for the applicant.

Satya Narain Prasad for the opposite-parties.

The judgment of the Court was delivered by—

LAL, J.:—This civil revision, filed by the Judgment-debtor, arises out of the amendment of the decree on an application made under section 152 of the Civil Procedure Code by the Decree-holders.

The decree-holders brought a suit for possession over certain land by removal of encroachment and also for

(1) A.I.R. 1934 All. 971.
(2) (1889) I.L.R. 11 All. 367.
(3) (1910) 7 A.L.J., 507.
(4) A.I.R. 1953 Bom. 129.
(5) A.I.R. 1958 S.C. 86.
(6) A.I.R. 1953 S.C. 565.
(7) A.I.R. 1958 S.C. 1036.

injunction. The suit was decreed "for possession over 1/16 nali of land shaded in yellow colour in Amin's map dated 15th March, 1953". There was no order of demolition of any wall or any particular constructions though it was also observed at a later part of the operative portion that "it is unfortunate that a portion of the defendants' house has to be demolished but for this the defendants have to thank themselves." The matter went up in appeal and the decree of the trial court was confirmed. The decree, which was prepared, did not mention any thing about the demolition of any constructions and so the decree-holders made an application under section 152, Civil Procedure Code, for amendment of the decree stating that the mistake was accidental or clerical. The learned Munsif of Pauri Garhwal relying upon the case of *Chinta Mani* v. *Debi Prasad* (1) accepted the decree holders' contention and ordered the amendment of the decree. It is against this order that the present revision has been filed.

The main contention of Sri *N. D. Pant*, learned counsel for the applicant, is that the decree passed by the trial court having been confirmed in appeal the trial court had no jurisdiction to amend the decree because of its merger.

I have heard learned counsel for the opposite-parties at some length. Except for the solitary case of *Chinta Mani* v. *Debi Prasad* (1) this Court has taken a consistent view that after the trial court's decree is affirmed in appeal the proper court to amend the decree under section 151, Civil Procedure Code is the appellate Court. Reference in this behalf was made to the authority of *Muhammad Sulaiman Khan* v. *Yar Khan* (2) where it was laid down by the Full Bench that where a decree has been affirmed on appeal "the only decree which can be amended under section 206 (now 152) of the Code is the decree to be executed, and the decree to be executed is

(1) A.I.R. 1954 All. 971. (2) (1888) I.L.R. 11 All. 267.

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that of the appellate court and not the superseded decree of the first court, though the latter may, if necessary, be referred to for the purpose of executing the appellate decree. The only court which has jurisdiction to amend the appellate decree is the court of appeal." It was followed in *Maiku Lal* v. *Mulaim Singh* (1) by a single Judge of this Court who held that "on a decree passed by the appellate court it is that court which could amend any errors that may be in a decree passed by the original court." That was also a case under section 152, Civil Procedure Code. In *Brij Narain* v. *Tejbal Bikram Bahadur* (2) which is a Privy Council case, it has been held that the court of first instance has no jurisdiction to alter or amend a decree after it has been affirmed in appeal. There is also an authority of Bombay High Court in the case of *Hussain Sab* v. *Sitaram Vighneshwar* (3) where the same view was laid down. That authority makes a distinction between appeals dismissed summarily under Order 41, rule 11 and those decided on merits and after stating the distinction, it has been laid down that "where the decree of the trial court is confirmed in appeal the decree of the trial court merges in the decree of the appellate court and if amendment is sought it should be sought in the appellate Court and not in the trial court."

None of the first three authorities appear to have been brought to the notice of the learned single Judge deciding the 1934 case of Allahabad who thought that it would be "highly inconvenient if it were necessary for such mistakes to form the subject of application in the High Court. If the order of the High Court is desired, an application may be made in review". With all respects to my learned brother I have to differ from his view because I am of opinion that once a decree has been affirmed in appeal the trial court's decree merges in the

(1) A.I.R. 1921 All. 130. (2) (1910) 7 A.L.J. 507.
(3) A.I.R. 1938 Bom. 122.

appellate decree and if any amendment is sought by means of section 152 it must be done by moving an application in the appellate court and not in the trial court.

Learned counsel for the opposite-parties has contended that the principle of merger should not apply to the decrees which have been confirmed in appeal though it may apply to other cases where there has been any variation in or reversal of the trial court decree. This view does not find support from the authorities and cannot be accepted because the very principle of merger is based on the fusion of the trial court decree into a higher decree. The learned counsel for the other side has further contended that even if there is merger it is for certain purposes and the operation of the decree passed by the trial court cannot be deemed to have been interrupted where the decree in appeal is merely one of dismissal. This may be true in certain cases and in fact this observation has been made by their Lordships of the Supreme Court in the case of *State of U. P.* v. *Mohammad Nooh* (1) where they have observed:

> "Whatever be the theory under other systems of law, under the Indian Law and procedure an original decree is not suspended by the presentation of an appeal nor is its operation interrupted where the decree on appeal is merely one of dismissal. . . . The filing of the appeal or revision may put the decree or order in jeopardy but until it is reversed or modified it remains effective."

The aforesaid observations of their Lordships were made in quite a different context. In the present case the point involved is of the jurisdiction, that is which court will have jurisdiction or power to deal with an application under section 152, Civil Procedure Code, after an appeal against such a decree has been decided on merits. This has nothing to do with the continued operation of the trial court decree nor is it any body's case that

(1) A.I.R. 1958 S.C. 86, 98.

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Lal, J.

the decree of the trial court remained suspended by the presentation of an appeal. The simple point for determination in the case is as to whether an application under section 152 should be filed in the appellate court which affirmed or varied the decree or in the trial court which tried the suit and passed the first decree. It is only in this context that a reference has been made to the principle of merger.

The principle of merger also appears to have been upheld by their Lordships of the Supreme Court in two other cases: *Commissioner of Income-tax* v. *M/s. Amrit Lal Bhogilal Co.* (1) and *Sitaram Goel* v. *The Municipal Board, Kanpur* (2). These two cases will show that the Supreme Court is also of opinion that a decree of the trial court gets merged into that of the appellate Court whether the appellate court affirms or reverses or modifies the decree.

On the principle of merger it may also be worth-while to refer two cases of review in which the principle of merger of the trial court decree into the appellate court decree has been laid down. In this connection a reference may be made to the authority of *Ram Baksh* v. *Mst. Rajeshwari Kunwar* (3) wherein the Division Bench held that:

> "When once a decree or order is affirmed on appeal by a superior court, it is not open to the lower court which passed the decree to entertain an application for review. The test undoubtedly is whether the decree passed by the superior court is such that the decree passed by the lower court has been merged in it. . . . But, where an appeal is dismissed on the ground that it was incompetent as there was no provision in law for the appeal, the case falls within the purview of Order 47, Rule 1(i)(*b*) and the above principle has no application."

(1) A.I.R. 1958 S.C. 868 (2) A.I.R. 1958 S. C. 1036.
(3) A.I.R. 1948 All. 218.

The same view appears to have been reiterated in a subsequent Full Bench case reported in the same volume at page 353. There is also an earlier authority of *Sheo Balak Singh* v. *Mahabir Singh* (1). That was also a case of review and it was held that "once a decree is affirmed by the High Court it merges into the decree of High Court and it is no longer open to the lower Court to vary that decree by way of review". A reference may also be made to the case of *Hafiz Mohammad Yusuf* v. *The Custodian General, Evacuee Properties, New Delhi* (2) in which the earlier view of this court was affirmed by holding that where an appeal has been heard and decided it is the decree of the appellate court which is operative and not of the trial court and consequently for an application under section 152, Civil Procedure Code, the proper court to entertain an application under section 152, Civil Procedure Court, after an appeal from the original decree has been decided on merits, will be the appellate court and not the trial court.

A plain reading of section 152, Civil Procedure Code, will show that "the court" may at any time correct either on its own motion or on the application of any of the parties, clerical or arithmetical mistakes in judgments, decrees or orders or errors arising therein from any accidental slip or omission. The expression 'at any time' is no doubt wide and gives the court a power to make the correction at any time, but this only does away with the question of limitation. The expression 'the court' should mean the court the decree of which is sought to be amended or the decree of which (court) is executable. In cases in which the decree of the trial court has been affirmed or varied in appeal the only executable decree is that of the appellate court because in such a case the decree of the lower court shall be deemed to have been superseded. In this view of the matter the Court which will have the jurisdiction to amend such

(1) A.I.R. 1931 All. 704. (2) 1954 A.L.J. 114.

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a decree should be the appellate court and not the trial court. I am of opinion that in view of the wordings of the section as well as the law laid down in various authorities referred to earlier the proper court for making an application under section 152, in cases where an appeal has been decided on merits and the decree of the lower court has merged into the appellate decree, would be the appellate court and not the trial court. The learned Munsif, therefore, who passed an order of amendment of the decree, had no jurisdiction to pass such an order and consequently the order passed by him must be set aside.

The revision is allowed with costs and the order passed by the court below is set aside.

Record of the case shall be sent back to the court below as early as possible.

Revision allowed.

SUPREME COURT

APPELLATE CIVIL

Before the Hon'ble Mr. Justice Gajendragadkar, the Hon'ble Mr. Justice Wanchoo and the Hon'ble Mr. Justice Das Gupta.

THE J. K. COTTON SPINNING AND WEAVING MILLS CO. LIMITED (APPELLANT)

v.

THE STATE OF UTTAR PRADESH AND OTHERS (RESPONDENTS)

1960 *December*, 19

[ON APPEAL FROM THE HIGH COURT AT ALLAHABAD]

Interpretation of Statutes—*Every part of statute should have effect—General provisions of Statute, whether should yield to special provision—Government Order, cl. 5(a) and cl. 23 under U. P. Industrial Disputes Act, 1947, construction of.*

By clause 5(a) of the Government Order issued by the Governor of the United Provinces in exercise of the powers conferred on him by the U. P. Industrial Disputes Act, 1947, 'any employee or recognised association of employers . . . . may by application in writing move the Board to enquire into any industrial dispute.

Clause 23 of the Government Order however provides that no employer . . . shall during the continuance of an enquiry or appeal discharge or dismiss any workman save with the written permission of the Regional Conciliation Officer concerned.

Where an application was made by an Employers' Association under clause 5(a) of the order for the dismissal of the watch and ward staff when an enquiry was pending under clause 23 and the Board granted the application but the Labour Appellate Tribunal dismissed it on the ground that the application under clause 5(a) was not maintainable. The Employers' Association filed a petition under Article 226 which was dismissed and on Special Appeal the order was

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affirmed but a certificate under Articles 132(1) and 133(1)(c) was granted to file an appeal to the Supreme Court.

On appeal to the Supreme Court,

Held, that in the interpretation of Statutes the courts always presume that the legislature inserted every part thereof for a purpose and the legislative intention is that every part of the Statute should have effect. The rule of interpretation of Statutes further is that the general provisions should yield to specific provisions and the general provision applies only to such cases which are not covered by the special provision. On an application of the above rule of interpretation of Statutes clause 5(*a*) has no application to a case where the special provisions of clause 23 are applicable.

Consequently when an enquiry was pending before a Conciliation Officer clause 23 applied in respect of any discharge or dismissal of a workman and the employer could not take the advantage of clause 5(*a*) of the Government Order and such an application could not in law be entertained by the Board.

Civil Appeal no. 157 of 1959 from the judgment and decree, dated the 5th January, 1956, of the Allahabad High Court, in Special Appeal no. 205 of 1954.

(connected with Civil Appeal no. 158 of 1959 from the judgment and order, dated the 15th January, 1952, of the Labour Appellate Court Tribunal of India, Allahabad, in Appeal no. Cal. 47 of 1951).

The facts appear in the judgment.

M. C. Setalvad, Attorney-General for India, *G. C. Mathur*, Advocate, with him, for the appellant.

M. R. Krishna Pillai, Advocate for Respondent no. 5 (in Civil Appeal no. 157 of 1959).

C. P. Lal, Advocate for the State of U. P. and Respondents nos. 2 and 4 (in Civil Appeal no. 157 of 1959).

O. P. Verma, representative of the Union for Respondent no. 5 (in Civil Appeal no. 158 of 1959).

The following judgment of the Court was delivered by—

1950

THE J. K. COTTON SPINNING AND WEAVING MILLS CO. LTD. v. THE STATE OF UTTAR PRADESH

DAS GUPTA, J.:—These two appeals raise the question of the maintainability of an application made by the Employers' Association of Northern India, Kanpur, on behalf of the J. K. Cotton Spinning and Weaving Mills Co. Ltd., a member of the Association in connection with the proposed termination of service of certain members of its watch and ward staff. But before we come to the consideration of this question it is necessary to indicate in brief the long and tortuous path this matter has travelled before coming to us. The application of the Employers' Association purported to be under clause 5(*a*) of the Government order, dated the 10th March, 1948, as amended by a later order of 15th May, 1948. This order was issued by the Governor of the United Provinces in exercise of the powers conferred on him by clauses (*b*), (*c*), (*d*) and (*g*) of section 3 and by section 8 of the U. P. Industrial Disputes Act, 1947. The application after stating that a number of thefts of Dhoties had taken place in the Mill further stated that it was obvious to the management of the J. K. Cotton Spinning and Weaving Mills Co. Ltd., that this state of affairs could not exist and continue if watch and ward staff were carrying out their duties vigilantly, correctly and honestly. It stated further that the management having lost confidence in the honesty of the watch and ward staff had decided to terminate the services of all the persons of the watch and ward staff and to recruit fresh men from the employment exchange and that in lieu of notice of termination of service the management would pay to these persons 12 days' wages in accordance with Standing Order no. 17A. The prayer made in the application was that "the Board be pleased

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DAS GUPTA, J.

to record the award entitling the J. K. Cotton Spinning and Weaving Mills Co. Ltd. to terminate the services of all the members of the watch and ward staff whose names appear in Annexure A". During the pendency of the application before the Board the applicant withdrew its prayer as regards 5 of the workmen. As regards the remaining workmen, after rejecting the preliminary objection raised on their behalf that the Board had no jurisdiction to entertain the application, the Board held that "it would not be in the interests of either party or in the interest of industry to allow the remaining 27 sepoys to continue in the employment of the Mills" and the Board accordingly made the award permitting the appellants to terminate the services of these 27 sepoys after giving them compensation at the rates set out by it—starting with 15 days' full wages and compensation for those with one year of service with additional amount of compensation on a graduated scale for longer periods of service. Against this order both the parties appealed to the Industrial Court. That court agreed with the Board's conclusion on the question of jurisdiction but pointed out that the "procedure adopted by the employers' association was defective inasmuch as the mills did not apply to the Regional Conciliation Officer to discharge the sepoys in question". On merits the court held that the evidence justified the conclusion of the Board that the management had lost confidence in the members of the watch and ward staff and that having regard to the Standing Orders their services should be terminated in accordance with the Standing Orders. It accordingly directed in modification of the order made by the Board "that the services of the 27 sepoys in question be terminated in accordance with the Standing Orders and that they would not be paid extra compensation as directed by the Board". The workmen then appealed to the

Labour Appellate Tribunal of India. The appellate tribunal held relying on an earlier decision of its own in *Kanpur Mill Mazdoor Union* v. *Employers' Association of Northern India* (1) that the application under clause 5(a) of the Government Order was not maintainable. Accordingly it allowed the appeal and set aside the award of the Board as well as the Industrial Court.

J. K. Cotton Spinning and Weaving Mills Co. Ltd., thereupon filed an application under Article 226 of the Constitution to the High Court of Judicature at Allahabad praying for a writ in the nature of *certiorari* calling for the records of the case from the Labour Appellate Tribunal of India and quashing the order of the Tribunal which has been mentioned above. Mr. Justice CHATURVEDI, before whom this application came up for hearing held that the application under clause 5(a) was maintainable and the Appellate Tribunal had erred in holding otherwise. Being however of opinion that there had been undue delay in making this application for a writ, he dismissed the petition on that ground. In the Letters Patent appeal preferred by the company against this decision a preliminary objection was raised on behalf of the union representing the workmen that the Allahabad High Court could not call for the records and quash the order of the Labour Appellate Tribunal of India as those records were in Calcutta and consequently beyond the reach of the court. The learned Judges who heard the appeal upheld this objection and dismissed the appeal. They however issued a certificate under Article 132(1) and Article 133(1)(c) of the Constitution. Thereafter the company also obtained special leave from this Court to appeal directly against the order of the Labour Appellate Tribunal of India.

(1) [1952] 1 L.L.J. 735.

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These two appeals preferred—one on the certificate granted by the High Court and the other on the strength of the special leave granted by this Court, have been heard together.

The main controversy, as already indicated, is on the question of the maintainability of the application under clause 5(*a*) of the Government order. This order issued by the Governor of the United Provinces in exercise of the powers conferred on him by the U. P. Industrial Disputes Act, 1947, contains detailed provisions as regards the settlement of industrial disputes. The first clause provides for the constitution of Conciliation Boards consisting of three members. Clause 2 provides for the appointment of conciliation officers for specified areas. Clause 5 contains the important provisions as to commencement of proceedings before the Board. It provides two ways of starting these proceedings: one mentioned in clause (*b*) is by an order made in writing by the Provincial Government for enquiring into a matter in respect of which an industrial dispute has arisen or is likely to arise. The other method is by means of an application by an employee or recognised association of employers or registered trade union of workers or where there is no such registered trade union the representatives not more than five in number duly elected by a majority of the workmen in the industry. Any of these may by an application in writing move the Board to inquire into an industrial dispute. This provision is in clause 5(*a*) which may be set out in full:

> "5(*a*). Any employee or recognised association of employers or registered trade union of workmen or, where no registered trade union of workmen exists in any particular concern or industry, the representatives not more than five

in number of the workmen in such concern or industry duly elected in this behalf by a majority of the workmen, in such concern or industry as the case may be, at a meeting held for the purpose may by application in writing move the Board to enquire into any industrial dispute. The application shall clearly state the industrial dispute or disputes which are to be the subject of such inquiry."

Clause 10 provides for the constitution of industrial courts for specified areas. Clause 12 provides for appeals to this Court against the awards made by the Board. The other clauses up to clause 22 deal with the powers and procedure of Board or the Industrial Court and with the duties of employers to permit certain meetings to be held. Then comes clause 23 which is in these words:

> "Save with the written permission of the Regional Conciliation Officer or the Additional Regional Conciliation Officer concerned, irrespective of the fact whether an inquiry is pending before a Regional Conciliation Board or the Provincial Conciliation Board or an appeal is pending before the Industrial Court, no employer, his agent or manager, shall during the continuance of an inquiry or appeal, discharge or dismiss any workman."

Section 24 provides that every order made or direction issued under the provisions of this Government order shall be final and conclusive. Clause 26 provides for penalties for contravention or an attempt to contravene any of the provisions of the order.

A consideration of the scheme of this legislation makes it clear that while two modes are provided in clauses 5(*a*) and 5(*b*) for the commencement of

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proceedings for settlement of industrial disputes generally, a special provision is made in clause 23 that if an enquiry is proceeding before a Regional Conciliation Board or the Provincial Conciliation Board or an appeal is pending before the Industrial Court, no workman shall be discharged except with the written permission of the Regional Conciliation Officer or the Additional Conciliation Officer concerned. The consequence in clause 26 is that if any workman is discharged or dismissed during the continuance of such enquiry or appeal without such permission the employer shall be liable to fine or to imprisonment not exceeding three years or both. The heavy punishment provided for contravention of the order shows the importance attached by the legislating authority to the directions given by the order.

In deciding whether an application under clause 5 (*a*) was maintainable in the facts of the present case two questions arise for consideration. The first is whether an industrial dispute comes into existence as soon as an employer decides on the dismissal of some of the workmen and proposes to give effect to such decision. One view is that it is only the party aggrieved by the proposed dismissal, in other words, the workmen, who by objecting to the same can raise the dispute and that the employer cannot by his own proposal to dismiss the workmen be heard to say that a dispute had come into existence even before the workmen had a chance to object to the dismissal. The contrary view which has found favour with Mr. Justice CHATURVEDI of the High Court is that even at the stage the employer proposes to dismiss his workmen it is a case of contemplated non-employment which will come within the expression "industrial dispute". The other question is whether the provisions of clause 23 of the order bar an application under clause 5(*a*)

during the continuance of any enquiry before the Regional Conciliation Board or the Additional Conciliation Board or during the pendency of the appeal before the Industrial Court. There is no dispute that on 13th June, 1950, when the application under clause 5(*a*) was made an enquiry was in fact pending before a Conciliation Officer. It appears that on 9th July, 1949, the Governor of the United Provinces made an order directing the Labour Commissioner of the United Provinces or a Conciliation Officer nominated by him in this behalf to re-start the adjudication proceedings between the J. K. Cotton Spinning and Weaving Mills Co. and S. N. Shukla, a dismissed employee of the concern. The Adjudicator was directed to conclude the adjudication and submit his award by 15th August, 1949. The time was extended by subsequent orders—first to 15th November, 1949, and then to 31st March, 1950, again to 30th June, 1950, and thereafter to 30th September, 1950. It is true that at the time these orders extending time for submission of award were made the Governor had no authority to make these orders and these orders were invalid. They were validated by the provisions of section 3 of the U. P Act XXIII of 1953. In view of this position of the law the learned Attorney-General has not disputed that on 13th June, 1950, when the application under clause 5(*a*) was made an enquiry was actually pending before a Conciliation Officer. Consequently, before the management could make any order discharging or dismissing any of its workmen it was required by clause 23 to obtain permission for the same from the Regional Conciliation Officer. The question is whether in spite of this provision in clause 23 the employer could make and the Board entertain an application under clause 5(*a*) on this question of proposed dismissal.

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We propose to consider this question first and for that purpose assume that an industrial dispute comes into existence as soon as the employer decides to dismiss his workmen and proposes to do so and that ordinarily he can make an application in such a dispute to the Board under the provisions of clause 5(*a*). If such application is decided against the employer and no permission is given to make the proposed dismissal, no difficulty arises. What, however, is the position if on such an application the Board makes an order granting the employer the requisite permission to dismiss his workmen? Under clause 24 this order unless modified in appeal will be final and conclusive and shall not be questioned by any party thereto. So far as the workmen are concerned they will not be able to dispute the correctness of the order except in the mode provided in the Government order itself. What, however, is the position of the employer if in pursuance of the order made on his application under section 5 (*a*) he discharges or dismisses his workmen? By doing so he will have clearly contravened the provisions of clause 23, and will become liable to the severe penalty provided in clause 26—a penalty which might even extend to imprisonment up to three years.

To remove this incongruity, says the learned Attorney-General, apply the rule of harmonious construction and hold that clause 23 of the order has no application when an order is made on an application under clause 5(*a*). On the assumption that under clause 5(*a*) an employer can raise a dispute sought to be created by his own proposed order of dismissal of workmen there is clearly this disharmony as pointed out above between two provisions, viz., clause 5(*a*) and clause 23; and undoubtedly we have to apply the rule of harmonious construction. In applying the rule, however,

we have to remember that to harmonise is not to destroy. In the interpretation of statutes the courts always presume that the legislature inserted every part thereof for a purpose and the legislative intention is that every part of the statute should have effect. These presumptions will have to be made in the case of rule making authority also. On the construction suggested by the learned Attorney-General it is obvious that by merely making an application under clause (5) on the allegation that a dispute has arisen about the proposed action to dismiss workmen the employer can in every case escape the requirements of clause 23 and if for one reason or other every employer when proposing a dismissal prefers to proceed under clause 5(*a*) instead of making an application under clause 23, clause 23 will be a dead letter. A construction like this which defeats the intention of the rule making authority in clause 23 must, if possible, be avoided.

It is hardly necessary to mention that this rule in clause 23 was made with a definite purpose. The provision here is very similar to section 33 of the Industrial Disputes Act before its amendment, though there are some differences. It is easy to see, however, that the rule making authority in making this rule was anxious to prevent as far as possible the recrudescence of fresh disputes between employers and workmen when some dispute was already pending and that purpose will be directly defeated if a fresh dispute is allowed to be raised under clause 5(*a*) in the very cases where clause 23 in terms applies.

There will be complete harmony however if we hold instead that clause 5(*a*) will apply in all other cases of proposed dismissal or discharge except where an inquiry is pending within the meaning of clause 23. We reach the same result by applying another well known rule

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of construction that general provisions yield to special provisions. The learned Attorney-General seemed to suggest that while this rule of construction is applicable to resolve the conflict between the general provision in one Act and the special provision in another Act, the rule cannot apply in resolving a conflict between general and special provisions in the same legislative instrument. This suggestion does not find support in either principle or authority. The rule that general provisions should yield to specific provisions is not an arbitrary principle made by lawyers and judges but springs from the common understanding of men and women that when the same person gives two directions one covering a large number of matters in general and another to only some of them his intention is that these latter directions should prevail as regards these while as regards all the rest the earlier direction should have effect. In *Pretty* v. *Solly* (quoted in Craies on Statute Law at p. 206, 6th Edition) Romilly, M. R., mentioned the rule thus—"The rule is, that whenever there is a particular enactment and a general enactment in the same statute and the latter, taken in its most comprehensive sense, would overrule the former, the particular enactment must be operative, and the general enactment must be taken to affect only the other parts of the statute to which it may properly apply". The rule has been applied as between different provisions of the same statute in numerous cases some of which only need be mentioned: *De Winton* v. *Brecon* (1), *Churchill* v. *Crease* (2), *United States* v. *Chase* (3) and *Carroll* v. *Greenwich Ins. Co.* (4).

Applying this rule of construction that in cases of conflict between a specific provision and a general

(1) 28 L.J. Ch. 598.
(2) 5 Bing. 177.
(3) 135 U.S. 255.
(4) 199 U.S. 401.

provision the specific provision prevails over the general provision and the general provision applies only to such cases which are not covered by the special provision, we must hold that clause 5(*a*) has no application in a case where the special provisions of clause 23 are applicable.

As in the present case an inquiry was in fact pending before a Conciliation Officer, clause 23 applied in respect of any discharge or dismissal of a workman and the employer could not take advantage of clause 5(*a*) of the Government Order and such an application could not in law be entertained by the Board.

In view of this conclusion it is unnecessary for us to consider the other question that was raised, viz., whether an industrial dispute within the meaning of clause 5(*a*) comes into existence as soon as an employer decides on the dismissal of some of its workmen and proposes to give effect to such a decision.

On the above conclusions we hold that the Labour Appellate Tribunal of India rightly held that the application under clause 5(*a*) filed on 13th June, 1950, was not maintainable and rightly set aside the awards of the Conciliation Board and the Industrial Court. The appeal against the order of the Labour Appellate Tribunal of India is, therefore, dismissed.

As we have already pointed out above the order made by the Appellate Bench of the High Court in the writ petition was based on its acceptance of the preliminary objection that the records of the Labour Appellate Tribunal being in Calcutta could not be reached by any writ of the Allahabad High Court. In view of our conclusion that the application under clause 5(*a*) was not maintainable, the appellant was on merits not

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entitled to any writ and on that ground the appeal against the High Court's order must also be dismissed.

It is unnecessary to consider the question whether the High Court was right in its view as regards the preliminary objection and we express no opinion on the same.

Both the appeals are accordingly dismissed with costs to the contesting respondent. There will be one set of hearing fee.

Appeals dismissed.

CRIMINAL REVISION

Before Mr. Justice J. Sahai and Mr. Justice Lal

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Prosecution under Factories Act—*Limitation for filing complaint for, starting point of—Factories Act,* 1948, *s.* 106.

The period of three months within which the complaint for an offence punishable under the Factories Act must be filed by the Inspector is to be computed from—(i) the date of his observation where the complaint is based directly on his personal knowledge, (ii) the date of receipt by him of the information where the complaint is based on information received through others, it being immaterial in the latter case whether the information is such which he believes instantaneously or after due enquiry.

The question of the date of the Inspector's knowledge of the alleged commission of the offence cannot be left to him or be provable by his evidence alone.

Criminal Revision no. 158 of 1960, from an order of H. N. KAPOOR, Civil and Sessions Judge, Meerut, dated the 30th October, 1959, in Criminal Revision no. 163 of 1959.

The facts appear in the judgment.

P. C. Chaturvedi, for the applicant.

Government Advocate, for the State.

The judgment of the Court was delivered by—

J. SAHAI, J.:—The petitioner R. S. Sharma has been convicted under section 80 of the Factories Act (hereinafter referred to as the Act) and rule 110 of the rules framed thereunder (hereinafter referred to as the rules) and sentenced to pay a fine of Rs.100. He filed a revision application before the learned Sessions Judge who refused to make a reference to this Court and rejected

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the application. Thereafter the petitioner filed a revision application in this Court under section 439 of the Code of Criminal Procedure which came up for hearing before a learned Single Judge. On a reference being made by him to a larger Bench the matter has come before us. The only submission that has been made on behalf of the petitioner before us is that the complaint on the basis of which he has been convicted was barred by limitation.

The accident giving rise to this reference and in which one Zile Singh was the victim occurred on the 19th of September, 1957. The matter was reported to the Inspector of Factories (hereinafter referred to as the Inspector) by means of an application, dated the 4th November, 1957, made by Zile Singh. The Inspector received this application on the 12th of February, 1958, and the complaint giving rise to this case was filed by the Inspector on the 7th of July, 1958.

Section 106 of the Act requires that a complaint should be made within three months of the date on which the alleged commission of the offence came to the knowledge of the Inspector. The question for consideration is whether on the basis of the information with regard to the offence which the Inspector received on the 12th of February, 1958, by means of the application of Zile Singh, knowledge can be imputed to him so as to attract the provisions of section 106 of the Act. The said section reads as follows:

> "106. No Court shall take cognizance of any offence, punishable under this Act unless complaint thereof is made within three months of the date on which the alleged commission of the offence came to the knowledge of an Inspector:
>
> Provided that where the offence consists of disobeying a written order made by an Inspector,

complaint thereof may be made within six months of the date on which the offence is alleged to have been committed."

It is common ground that the proviso is not applicable to the facts of the present case and we are concerned only with the main clause of section 106 of the Act. Section 106 of the Act lays down a rule which affects the jurisdiction of the court. If the complaint, is not filed within the period prescribed, the court shall not have jurisdiction to try the same. The key word in the section is "knowledge". It has been contended on behalf of the State that there is a difference between 'knowledge' and 'information' and knowledge can be imputed to a person only at the stage when he believes the information to be true and that stage can only be reached after an enquiry has been made and satisfaction reached by the Inspector that the information is correct. It has been submitted that whether or not an Inspector had knowledge can be proved by him alone. In shorter Oxford English Dictionary among other the following meanings have been given to the word "knowledge":

> "Acquaintance with a fact; state of being aware or informed; consciousness (of anything); acquaintance with facts, range of information. Intellectual acquaintance with, or perception of, fact or truth; the fact, state or condition of understanding. Formerly, also, intelligence, intellect. A mental apprehension; a cognition. Theoretical or practical understanding of an art, science, language, etc. The fact or condition of being instructed; information acquired by study; learning; Information, intelligence; intimation."

It would be seen from the above that the word "knowledge" is sometimes used also in the sense of infor-

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mation. When a person says that he has knowledge he is describing a state of his mind. That state may be reached either by what one sees or by what he hears and what he believes to be true. If an information is received which the Inspector does not believe to be false or has no reasons to believe it to be false he would be attributed a state of mind which may amount to his having knowledge of that matter. It may be noticed that the words used in section 106 of the Act are "came to the knowledge of an Inspector" and not "when the Inspector was satisfied about the correctness of the information". If the legislature intended that an enquiry should be made by an Inspector and only if he is satisfied about the correctness of the information he should make a complaint, the words used by the legislature would have been "within three months of the date on which the Inspector is satisfied about the commission of the offence". Both satisfaction and knowledge denote a state of mind. In order to be satisfied or in order to have knowledge there must be some basis. The basis may be, as we have said above, either what is seen what is heard or the information received. Knowledge is that state of mind when the person believes a thing to be true or has no reasons to believe that it is not true. The state of satisfaction is reached only when the man is certain after deliberate consideration over the matter that thing exists beyond all doubt. When a person gets fully determined either by the subjective process of deliberating over the matter or by the objective process of making an enquiry or by seeing the thing himself the stage of knowledge ceases and the stage of satisfaction sets in. In our judgment the word "satisfaction" has not been purposely used in section 106 of the Act. Inasmuch as the Inspector has only to make allegations by lodging a complaint the satisfaction about the

correctness or otherwise of the allegations has got to be that of the court. In our opinion the word "knowledge" has been used in the sense that if the Inspector himself sees an offence being committed or if he receives information which he has no reason to disbelieve it would amount to his having knowledge of the offence. It is true that the legislature did not use the word "information" but for that there are two obvious reasons. The first one being that if the word "information" was used that would not have included a complaint being made on the basis of what the Inspector saw for himself as the word "information" would not have comprehended cases where the Inspector saw an offence being committed with his own eyes and in respect of which he did not receive any information and secondly because it was not expected that he would act on every information including the one which he knows to be untrue. It has been contended by the learned Government Advocate that an Inspector alone can depose on what date he had knowledge of the offence and his statement on that point should, therefore, be final. We are not prepared to accept this argument. We have already pointed out that section 106 of the Act is a provision by means of which the jurisdiction of a court is barred under certain circumstances. In other words it confers an immunity to an offender in cases where a complaint is not made within the period of limitation provided. Consequently it is a matter which goes to the root of the jurisdiction of the court and in every case in which the jurisdiction is challenged by an accused person it is the duty of the court first to determine whether or not the complaint was filed within three months from the date of knowledge to the Inspector. It is obvious that such a question has got to be determined in an objective manner and on the basis of the evidence produced by the parties

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and cannot be left to be concluded by the statement of the Inspector. It is open to the court not to believe the statement of the Inspector that he had received knowledge on a particular date. The statement of the Inspector is only a piece of evidence which may or may not be believed. The Inspector cannot usurp the functions which the legislature has vested in courts. It is not difficult to visualise as to what would be the consequences if the question as to whether or not the Inspector had knowledge of the commission of the offence on a particular date were to be concluded by the statement of the Inspector. In the first place he would become a judge of his own cause and from a witness or a complainant would ascend to the position of a judge. Besides even in cases in which he has been inactive or lethargic and has filed a complaint beyond the period prescribed he would be able to confer the jurisdiction on the court to try the case by falsely stating that his enquiries concluded and he acquired knowledge of the offences on some date within three months of the filing of the complaint. In other words the jurisdiction of the court to try or not to try a case would not depend upon the factual position in the case but upon the sweet will of the Inspector. We have no doubt in our mind that that is not what the legislature intended by enacting section 106 of the Act and it is not possible to stretch the meaning of the word "knowledge" so as to include an earlier enquiry and satisfaction of the Inspector that the offence was actually committed. It is true that an Inspector like any other complainant should not file a complaint merely on suspicion or hearsay or one which is false or vexatious to his knowledge but neither section 106 of the Act requires nor is it the import of the word "knowledge" that the filing of a complaint should be preceded by an enquiry and only after the Inspector is satisfied that the offence has been

actually committed he should file a complaint. In fact a complainant is not expected to do so under the general law and nothing has been pointed out to us in the Act to show that the same differs from the general law in this matter. To investigate and enquire into the truth of an allegation is not the function of a complainant but that of the court though a complainant is not expected to rush to a court unless he believes that the allegations he is making in court are not false. There is a difference of degrees between "believe" and "satisfy". For belief there need not be a certainty which is required in the case of satisfaction. The Inspector need not have full satisfaction that the offence has really been committed in order to file a complaint. If he believes an information and thus understands that an offence has been committed or has no reason to disbelieve the information he should file a complaint and leave it to the court to decide whether or not the information received by him is true and whether or not in fact the offence has been committed. Can it be said that in a case where there is good evidence to show that an offence has been committed but the Inspector does not personally believe that evidence or does not feel satisfied about its correctness he can refuse to file a complaint and thus deprive the court of adjudicating upon that matter? It will be his duty to put before the court the evidence that is in his possession and leave it to the court to decide whether that evidence should be believed or not. He cannot himself assume the role of the court and decide for himself whether or not that evidence is correct and in cases where he comes to the conclusion that it is not correct, not to file a complaint. Such a course would be much in excess of his functions and if he does not file a complaint only on the ground that he does not personally believe that evidence he would be committing a serious dereliction of duty. All

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that is required on his part is that he should not rush to court with frivolous and vexatious cases. The law only requires that he must act *bona fide* and put in court cases in which there is some evidence to support the charge. For exercising such functions it appears to us that it is not necessary for him to hold an enquiry and we have already said above that section 106 of the Act or any other section in the Act does not require him to do so. This does not mean that he cannot hold an enquiry at all in order to find out what evidence he will produce in court or whether the case is not a frivolous or vexatious one. All that we intend to say is that the holding of an enquiry is not a condition precedent to his acquiring knowledge of the commission of the offence.

To know is not necessarily to have precise knowledge of. Knowledge of circumstances ordinarily leading to the conclusion that the thing or the state of thing exists will suffice. We find support for our view from the case of *National Bank of Australasia* v. *Morris* (1). In that case the question was whether the Bank knew that its debtor was insolvent and the test adopted by the Privy Council was that if the information received by the Bank was such that ordinary men of business would on its basis conclude that the debtor is unable to meet his liabilities, knowledge of insolvency would be imputed to the Bank. The following words from that judgment are very helpful:

> "Their Lordships conceive that if the creditor who receives payment has knowledge of circumstances from which ordinary men of business would conclude that the debtor is unable to meet his liabilities, he knows, within the meaning of the Act, that the debtor is insolvent . . . . . We need not inquire nicely whether Balfour used

(1) L.R. [1892] A.C. 287.

the term 'insolvent', as is suggested by a subsequent passage in his evidence, in a sense compatible with Braun's inability to meet his engagements. It is sufficient that he knew the facts which ought to have shown him clearly enough that Braun could not do so."

In *Ram Nath Aiyar's Law Lexicon* under the heading "knowledge" and "belief" the following is given:

> '"Knowledge" is nothing more than men's firm belief, and is distinct from "belief" in that the latter includes things which do not make a very deep impression on the memory. The difference is ordinarily merely in degree.
>
> The meaning of the words "belief" and "knowledge" as defined by lexicorgraphers will show that there is distinct and well-defined difference between them. "Belief" is defined by Webster to mean to exercise trust or confidence; and by the Century Dictionary, to exercise belief in; to be persuaded upon evidence, arguments and deductions, or by other circumstances other than personal knowledge. "Knowledge" according to Webster, is the act or state of knowing; clear perception of facts; that which is or may be known according to the Century Dictionary it means acquaintance with the things ascertained or ascertainable; specific information.'

If an Inspector has specific information or information which he has no reason to disbelieve he will be imputed the knowledge. In *Emperor* v. *Zamin* (1) the word "knowledge" came up for interpretation in connection with a criminal case and the learned Judge observed as follows:

> "Without going into a metaphysical discussion of the nature of knowledge, we may say that for

(1) A.I.R. 1932 Oudh. 28.

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practical and legal purposes "knowledge" means the state of mind entertained by a person with regard to existing facts which he has himself observed, or the existence of which has been communicated to him by persons whose veracity he has no reason to doubt.'

We find ourselves in agreement with this view. The learned Government Advocate placed reliance upon the case of *Gahbar Pande* v. *Emperor* (1) and has drawn our attention to the following passage in the judgment:

> 'No doubt a man is presumed to intend the natural and inevitable conclusions of his own act, but the presumption of intention must depend upon the facts of each particular case, and "knowledge", as used in clause (2) of section 300, I. P. C. is a word which imports a certainty and not merely a probability.'

In that case the learned Judges were interpreting the word "knowledge" as used in section 300 of the Indian Penal Code and all that they held was that before an accused person can be convicted by attributing knowledge of a particular thing that knowledge must be proved beyond all reasonable doubt. That case, in our opinion, is clearly distinguishable because whereas an accused person can only be convicted if the facts found against him have been proved beyond all reasonable doubt, it is not the function of the Inspector for filing a complaint under the Act to reach a certainty in his mind that the allegations are correct. We have already said above that if he has no reason to disbelieve the information and there is evidence it is his duty to submit a complaint.

The learned Government Advocate next placed reliance upon the case of *Prabhu Lal Dayalji* v. *The*

(1) A.I.R. 1928 Pat. 169.

State (1). The facts of that case were different from the facts of the case before us as would be apparent from the following observations of the learned Judge:

> "The contention is untenable because, as I said, the consideration of the whole question was deferred in view of the pending dispute before the Industrial Tribunal, and in view of the same it could not be said that the Factory Inspector had come to know that it was an offence. The latter part of the contention therefore does not survive. So far as the prosecution itself is concerned, the complaint was made by the Factory Inspector within three months of the written order, dated 9th January, 1951, and it is, therefore, not barred under section 106, Factories Act.
>
> The prosecution having been launched for failing to comply with the said order the question of the Factory Inspector having come to know of the offence earlier namely, on his visit to the factory on 21st December, 1950 and the complaint being required to be filed within three months of the date does not really arise, and Mr. Shah has also not pressed it on this ground. The complaint is filed for the disobedience of the order, dated 9th January, 1951, for which the limitation is six months and since it was filed within that period, it is perfectly within time."

In the end the learned counsel for the State placed reliance upon an unreported decision of our brother DESAI, in S. P. Mehra *v.* State (2) and the following two passages were brought to our notice:

> "Whether he had knowledge or not can be proved by him alone; if he did not believe the information or wanted to verify its truth

(1) A.I.R. 1956 Sau. 4.

(2) Criminal Miscellaneous no. 922 of 1956, decided on 18th May, 1955.

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before acting upon it he did not treat it as knowledge . . . . . it is for him to decide whether to make a complaint or not and to ascertain what legal evidence there is in support of it, and before he decides to make a complaint he must know as a matter of fact that the offence has been committed. The law contemplates that he should make a report on knowledge of facts only, not on suspicion or hearsay. This practically means that he must have personal knowledge. So if he received information from some one, he may either believe it to be true or verify its truth by an enquiry. He is not bound by any law to make a complaint even if he does not believe it to be true, he has a right to insist on making an enquiry so as to acquire personal knowledge and the period of limitation must commence from the date of such knowledge."

With great respect to the learned Judge we are not prepared to go so far and for the reasons which we have already given above we are unable to accept the proposition that whether or not an Inspector has knowledge can be proved by him alone and that he must acquire personal knowledge before he can file a complaint We are also unable to subscribe to the view that even though there be evidence in support of the information or the charge an Inspector is not bound to make a complaint if he has no personal knowledge that the offence has been committed. In our judgment the knowledge of section 106 of the Act does not warrant any such conclusion. Besides it is well known that while interpreting a statute the interpretation which does not result in defeating the object of the Act, or the provision being interpreted, should be accepted, and effort should be made by courts to implement the purpose or the object of the Act, or the provision,

(See *Tirath Singh* v. *Bachittar Singh* (1) and *Commissioner of Income-tax* v. *S. Teja Singh*, (2). We have already said above that it was the clear intention of the legislature that if a complaint is not filed within the period of limitation provided for the jurisdiction of the court to try that case would be lost and the person who is supposed to have committed the offence would get an immunity from prosecution on that charge. If we take a contrary view the result would be that the object of the provision would be defeated and even though a complaint may be barred by time and thus the accused person may have obtained immunity from prosecution he would be liable to be tried if the Inspector falsely deposed that he received knowledge on a date within three months of the filing of the complaint. It may also be stated that in a criminal statute if two interpretations are possible the one in favour of the accused person should be accepted. For the reasons mentioned above we are of the opinion that under the provisions of section 106 of the Act an Inspector must file a complaint if he saw the commission of the offence himself within three months of the date of seeing, and if he received information which he could have no reason to disbelieve, within three months of the receipt of the information. Even in cases of information which he does not believe he must act promptly and if he has to make an enquiry he must complete it within such time so as to file a complaint within the time provided by law. In our opinion in cases in which he files a complaint on the basis of a particular information, though after an enquiry the starting point of limitation would be the date of the information and not the date of the conclusion of the enquiry. It would be noticed that the legislature did not require a complaint to be filed immediately or within a few

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(1) A.I.R. 1955 S.C. 830. (2) A.I.R. 1959 S.C. 352.

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days of the knowledge of the offence and provided three months for doing so. This to our mind was clearly provided for so that investigation if any should be finished before the expiry of that period. Cases under the Act are of a simple and petty nature and if an enquiry is at all made by the Inspector it cannot take much time and can very reasonably be concluded much before the expiry of three months from the date of information.

In any case in the present case Ex. Kha-2, the letter of the Chief Inspector of Factories to the Manager of Saru Smelting and Refining Corporation (Private) Ltd., Meerut, dated 18th January, 1958, clearly shows that the Inspector had received the information that the accident relating to Zile Singh had taken place within the factory premises on the 19th of September, 1957, and that the management was required to furnish an accident report. The present complaint was filed on the 7th of July, 1958, i.e. more than three months even after the 18th of January, 1958. In the present case, therefore, there cannot be the least doubt that the complaint was filed beyond the period of limitation provided by law and the magistrate had no jurisdiction to try the applicant.

The result is that the application is allowed. The order of the learned magistrate, dated the 10th of July, 1959, convicting and sentencing the applicant is set aside. The fine, if paid, shall be refunded.

Application allowed.

SUPREME COURT

APPELLATE CIVIL

Before the Hon'ble Mr. Justice Kapur, the Hon'ble Mr. Justice Hidayatullah and the Hon'ble Mr. Justice Shah

THE CENTRAL TALKIES LTD., KANPUR (APPELLANT).

1961 *January, 16*

v.

DWARKA PRASAD (RESPONDENT).

[ON APPEAL FROM THE HIGH COURT AT ALLAHABAD]

U. P. (Temporary) Control of Rent and Eviction Act, 1947, *ss.* 2(*d*), 3 *and Code of Criminal Procedure,* 1898, *s.* 10(2)—*Interpretation of—District Magistrate, whether includes an Additional District Magistrate*

By s. 3 Rent Control and Eviction Act no suit for the ejectment of a tenant could be filed without the permission of the District Magistrate except on one or more of the grounds specified in the section.

Where a suit for ejectment was filed on the permission of the Additional District Magistrate the defence raised was that the suit was incompetent as the necessary permission of the District Magistrate had not been obtained.

The High Court in second appeal having repelled the contention; on an appeal to the Supreme Court,

Held, that the District Magistrate within the meaning of s. 2(*d*) of the Act read with s. 10(2) of the Code of Criminal Procedure includes an Additional District Magistrate and no special authorization by the District Magistrate is necessary to empower the Additional District Magistrate to exercise powers under s. 3.

Held, further, that the District Magistrate within the meaning of the Act is not a *persona designata* as *persona designata* is a person who is selected to act in his private capacity and not in his capacity as a judge.

Parthasarathi Naidu v. *Koteswara Rao* (1) applied

(1) (1923) I.L.R. 47 Mad 369, 373 (F.B.)

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Civil Appeal no. 374 of 1957, from a decree and judgment, dated the 21st September, 1955 of the Allahabad High Court in First Appeal no. 251 of 1954.

The facts appear in the judgment.

A. V. Vishwanatha Sastri and *G. S. Pathak*, Senior Advocates (*Naunit Lal*, Advocate, with them) for the appellant.

N. C. Chatterjee, Senior Advocates (*S. N. Andley*, *J. B. Dadachanji* and *P. L. Vohra*, Advocates of Messrs Rajinder Narain & Co with him) for the respondent.

The following Judgment of the Court was delivered by—

HIDAYATULLAH, J.—This is an appeal against the judgment and decree of the High Court of Allahabad with a certificate granted by the High Court under Art. 133 (1) (*b*) of the Constitution. The High Court reversing the decision of the trial Court, decreed the present suit for ejectment against the appellants, and also awarded damages to the plaintiff-respondent at the rate of Rs 593-12-0 per month. The suit was filed by the respondent, Babu Dwarka Prasad, against the appellants, Central Talkies, Ltd., Kanpur and Lala Ram Narain Garg, the Managing Director of the Company.

The facts, briefly stated, are as follows: Dwarka Prasad was the sole owner of a plot of land no. 73/22 (old no 73/28) situated in Collectorganj, Kanpur. In 1933, an agreement of lease was executed by five persons in favour of Lala Rameshwardas, the predecessor-in-title of Babu Dwarka Prasad, by which the five lessees took over on lease a hall and other constructions, which the lessor agreed to build at a cost of Rs.16,000 within four months. It was agreed that, if the lessor was required to spend an amount in excess of Rs.16,000, he would be entitled to interest at the rate of 12 annas per cent per month from the second party till the end of tenancy. The

tenancy was from month to month, and the period of the tenancy was fixed at 5 years in the first instance. This tenancy continued with variations in the amount of rent till the year 1946, and on January 15, 1946, Dwarka Prasad sent a letter to the defendants that the period of lease was to expire on February 28, 1946, and that the Central Talkies, Ltd. should vacate the premises by that date. The defendants did not vacate the premises, and a suit for ejectment was filed against the Central Talkies, Ltd.

During the pendency of that suit, the United Provinces (Temporary) Control of Rent and Eviction Act, 1946 (referred to in the judgment, as the Eviction Act) came into force. Under s. 3 of the Eviction Act, permission of the District Magistrate was required to file in any Civil Court a suit for the eviction of a tenant, except on grounds which were enumerated in the section. Admittedly, that suit was filed on a ground which was not enumerated in the section and Dwarka Prasad withdrew it. He then applied to the District Magistrate for permission to eject the Central Talkies Ltd., from the premises, and permission was granted by the Additional District Magistrate (Rural Area) on July 7, 1948. It is not necessary to state the pleas which were taken by the defendants in the newly filed suit, because the only point argued before us was that the suit was incompetent, because permission of the District Magistrate as required by s. 3 had not been obtained.

The Divisional Bench of the High Court held that the suit was competent. The two learned Judges, who heard the appeal, reached the same conclusion, though on slightly different grounds. RAGHUBAR DAYAL, J. held that the Additional District Magistrate, who granted permission, was empowered by the Provincial Gov-

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ernment under s. 10(2) of the Code of Criminal Procedure to exercise all the powers of a District Magistrate under the Code and all the laws for the time being in force and the requirements of s. 3 were complied with BRIJ MOHAN LAL, J., came to the conclusion that the District Magistrate by transferring the case to the Additional District Magistrate (Rural Area) had authorised him to perform his functions under the Act in this behalf and that the Additional District Magistrate, being thus included in the definition of "District Magistrate" under s. 2(*d*), was competent to grant the permission. Concurring, therefore, that the suit was instituted with the permission of the District Magistrate as required by the Eviction Act, the Divisional Bench held that the suit was competent.

It may be pointed out that, at first, the application for permission was made over by the District Magistrate to Mr. Hadi Hasan, who was also an Additional District Magistrate; but the latter sent the case back to the District Magistrate asking for a transfer, because he had been approached on behalf of the defendants. The District Magistrate thereafter passed an order on February 11, 1948, to the following effect:

> "Transferred to Additional District Magistrate (R. A.) for disposal."

The application for permission was disposed of by Mr. Brijpal Singh Seth, Additional District Magistrate (Rural Area), on July 7, 1948. This officer, who was previously a City Magistrate, Kanpur, was appointed an Additional District Magistrate by notification no. 3400/II-276-48, dated 22nd May, 1948. The material portion of this notification read as follows:

> "With effect from the date on which he takes over charge Shri Brijpal Singh Seth, City Magis-

trate, Kanpur, is appointed vice Shri Sheo Ramdas Saksena—

> (*a*) under sub-section (2) of section 10 of the Code of Criminal Procedure, 1898 (Act V of 1898), to be an Additional District Magistrate of Kanpur District, with jurisdiction extending over the whole of the said district and with all the powers of a District Magistrate under the said Code and under any other law for the time being in force. . . ."

The appellants contended before us that both the reasons given by the Divisional Bench of the High Court were not valid, and that the suit was not brought in accordance with the Eviction Act. At first, the appellants wished to raise a question as to the invalidity of the notice; but during the course of the arguments, that ground was expressly abandoned. The case was thus argued only on the footing that the permission given by Mr. BRIJPAL SINGH SETH did not comply with s. 3 of the Eviction Act.

The material portion of s. 3, as it stood on the relevant date, read as follows:

> "No suit shall, without the permission of the District Magistrate, be filed in any civil court against a tenant for his eviction from any accommodation, except on one or more of the following grounds. . . ."

"District Magistrate" is defined by s. 2 (*d*) of the Act, which reads:

> "'District Magistrate' includes an officer authorized by the District Magistrate to perform any of his functions under this Act."

The argument of the appellants was that the District Magistrate mentioned in s. 3 was a *persona designata*,

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and that either he or an officer authorised by him to perform his functions could grant permission. According to them, in view of the provisions quoted above and in view also of the provisions of s. 1 (2) of the Code of Criminal Procedure, no Additional District Magistrate was competent to grant the permission, unless authorised to do so by the District Magistrate. The order of the District Magistrate by which the case was made over to the Additional District Magistrate (Rural Area) was characterised as a mere transfer and not an authorisation. It was contended that a transfer could only take place to a person possessing jurisdiction, and that jurisdiction under the present Act was confined only to the District Magistrate or an officer authorised by him. The transfer of the case, it was contended, did not constitute such authorisation. Reliance was placed on the decision of learned Single Judge of the Allahabad High Court reported in *Kedar Nath* v. *Mool Chand* (1), and on the decision of the Nagpur High Court referred to therein, *P. K. Tave* v. *Emperor* (2).

Section 10 of the Code of Criminal Procedure, at the relevant time, provided as follows:

> "10(1). In every district outside the presidency-towns the Provincial Government shall appoint a Magistrate of the first class, who shall be called the District Magistrate.
>
> (2) The Provincial Government may appoint any Magistrate of the first class to be an Additional District Magistrate and such Additional District Magistrate shall have all or any of the powers of a District Magistrate under this Code or under any other law for the time being in force, as the Provincial Government may direct."

(1) A. I. R. 1933 All. 62. (2) A. I. R. 1943 Nag. 26.

The notification, which was issued about Mr. BRIJPAL SINGH SETH and which has been quoted already, invested him with all the powers of the District Magistrate under the Code of Criminal Procedure as well as under any other law for the time being in force. He was thus competent to deal with an application under the Act for permission to file a civil suit without special authorisation from the District Magistrate. Learned counsel for the appellants contended that the definition of "District Magistrate" clearly showed that in addition to the District Magistrate, only an officer specially authorised by him could act under the Eviction Act, and he referred to sub-s. (2) of s. 1 of the Code of Criminal Procedure, which provided:

> "It extends to the whole of British India; but, in the absence of any specific provision to the contrary, nothing herein contained shall affect any special or local law now in force, or any special jurisdiction or power conferred, or any special form of procedure prescribed, by any other law for the time being in force. . . . ."

The argument was that the special jurisdiction created by the Eviction Act was not affected by s. 10(2) of the Code, in view of the provisions of this sub-section. The argument overlooks the words "in the absence of any specific provision to the contrary", and because there is in the Code of Criminal Procedure such a provision in s. 10(2), sub-s. (2) of s. 1 is excluded, and an Additional District Magistrate must be regarded as possessing the powers under any other law including the Eviction Act.

The argument that the District Magistrate was a *persona designata* cannot be accepted. Under the definition of "District Magistrate", the special authorisation by the District Magistrate had the effect of creating

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officers exercising the powers of a District Magistrate under the Eviction Act. To that extent, those officers would, on authorisation, be equated to the District Magistrate. A *persona designata* is "a person who is pointed out or described as an individual, as opposed to a person ascertained as a member of a class, or as filling a particular character." (*See* Osborn's Concise Law Dictionary, 4th Edn, p. 253).

In the words of SCHWABE, C. J. in *Parthasaradhi Naidu* v. *Koteswara Rao* (1) *personae designatae* are "persons selected to act in their private capacity and not in their capacity as Judges". The same consideration applies also to a wellknown officer like the District Magistrate named by virtue of his office, and whose powers the Additional District Magistrate can also exercise and who can create other officers equal to himself for the purposes of the Eviction Act. The decision of SAPRU, J., in the Allahabad case, with respect, was erroneous.

Reference was made to the definition of "District Magistrate" in the United Provinces (Temporary) Accommodation Requisition Act, 1947, which includes an "Additional District Magistrate". This definition has been made wide for obvious reasons, because under s 10(2) of the Code of Criminal Procedure, the Additional District Magistrate has to be specially empowered. By including the Additional District Magistrate in the definition of "District Magistrate", power is conferred by the Requisition Act itself, whether or not the provincial Government specially empowered any particular Additional District Magistrate in that behalf. The Eviction Act, on the other hand, gave power to the District Magistrate to authorise officers other than the Additional District Magistrates empowered by the Provincial Government, by defining the term "District Magistrate" differently.

(1) (1923) I.L.R. 47 Mad. 369, 379 (F.B.)

In view of the above, it is hardly necessary to go into the reasons given by BRIJ MOHAN LAL, J.; but even those reasons are, with all due respect, equally valid. By the act of transferring the case to the Additional District Magistrate, the District Magistrate must be deemed to have authorised him to exercise his powers under s. 3 of the Eviction Act. However, it is not necessary to rely upon this aspect of the case, because, in our opinion, s. 10(2) of the Code of Criminal Procedure gave ample powers to Mr. BRIJPAL SINGH SETH to accord permission for bringing the suit, and the order of the District Magistrate, even if treated as a transfer, was valid.

In the result, the appeal fails, and is dismissed with costs.

Appeal dismissed.

APPELLATE CIVIL

Before Mr. Justice Beg and Mr. Justice Srivastava

NARSINGH DAS AND ANOTHER (APPELLANTS).

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March, 20

v.

PARMESHWARI DAS (RESPONDENT)

Forfeiture of lease for non-payment of rent—*Relief against when available—'Rent in arrears', meaning of—Transfer of Property Act,* 1882, *s.* 114.

The jurisdiction of the Court under s. 114 of the Transfer of Property Act to relieve the lessee from the forfeiture of lease for non-payment of rent is equitable the exercise of which rests in the discretion of the court and may well be denied to a lessee who does not come with clean hands or raises all kinds of unnecessary, vexatious or frivolous pleas with a view to delay the disposal of the case or to harass the lessor.

The arrears of rent which the lessee is bound to pay or secure as a condition precedent for the grant of the equitable relief means rent due up to the date of tender, where the relief is granted it means as if forfeiture had never occurred. The relationship of lessor and lessee is, therefore, deemed to have subsisted all through and the amount due even after the forfeiture alleged or determination of the lease notified is not 'damage for use and occupation' but is 'rent due' and it is not open to the lessee to raise that distinction and plead his obligation only to the extent of rent due up to the date of forfeiture or determination of the lease.

Dhurrumtolla Properties Ltd. v. *Dhunbai Peroshaw* (1) relied on.

Special Appeal no. 564 of 1958 from a decision of UPADHYA J., in Second Appeal no. 638 of 1956, decided on 10th October, 1958.

The facts appear in the judgment.

Babu Ram Avasthi, for the appellants.

Ambika Prasad for the respondent.

The judgment of the Court was delivered by—

BEG, J.—This is a defendant's Special Appeal. It arises out of a suit for arrears of rent and damages and

(1) A. I. R. 1931 Cal. 457.

for possession of the land in suit after the removal of the constructions raised thereon by the defendants. The respondent is the landlord of the premises in question. The instrument of lease which is alleged to be the basis of the tenancy of the defendants-appellants was executed on the 20th of July 1943, for a period of 30 years on an annual rent of Rs.100. One of the terms of the lease was that the lessee would be liable to pay rent every third month, and that, in the event of the lessee failing to comply with this term, he would be liable to ejectment even before the expiry of the period for which the lease was granted, and the lessor would then have the right to get possession of the premises by removal of constructions erected thereon. The rent fell into arrears after the 20th of July, 1950, and a sum of Rs.833-14 became due for the period 20th of July, 1950 to 19th November, 1953. The landlord, accordingly, sent a notice on the 22nd of November, 1953, determining the lease with effect from 20th December, 1953, and demanding the arrears due. The arrears of rent having not been paid the present suit was brought by the plaintiff-respondent for the possession of land after removal of constructions standing thereon, the recovery of the arrears of rent as well as damages from the 20th December, 1953, the date of the determination of the lease, up to the date of the institution of the suit and for ejectment.

The suit was contested by the defendants on several grounds. It was alleged that the original contract had been altered by the parties with the result that there was novation of the contract. It was further alleged that under the new contract it was agreed that defendant no. 1 would no longer be the tenant of the plaintiff and the defendant no. 2 would be substituted as the tenant in place of defendant no. 1. Defendant no. 1

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was, therefore, no longer liable for rent. Further no valid notice to quit was given to defendant no. 2. The tenancy had not, therefore, been determined and no question of paying damages arose. Pleas relating to under-valuation of the suit and insufficiency of court-fee were also taken. The trial court recorded findings in favour of the plaintiff and decreed the suit.

The defendants-appellants' first appeal having been dismissed, they filed a second appeal in this court. The second appeal was dismissed by a single Judge of this Court who, having granted leave to the appellants, this Special Appeal was filed by them.

Before us the learned counsel for the appellants has advanced two contentions. The first contention is that the notice of ejectment issued by the respondent was not a valid one; and the second contention is that, in any case, the defendants were entitled to the protection of section 114 of the Transfer of Property Act.

The first plea can be disposed of summarily. This plea was given up by the defendants in the trial court. It was not agitated by them either at the stage of first appeal or even at the stage of second appeal. Further, there is no ground mentioning this plea in the memorandum of Special Appeal filed by them. Under the circumstances, we decline to entertain this plea.

So far as the second plea is concerned, learned counsel for the appellants has relied on the provisions of section 114 of the Transfer of Property Act (IV of 1882). Section 114 provides as follows:

> "Where a lease of immovable property has determined by forfeiture for non-payment of rent, and the lessor sues to eject the lessee, if, at the hearing of the suit, the lessee pays or tenders to the lessor the rent in arrear, together with interest thereon

and his full costs of the suit, or gives such security as the Court thinks sufficient for making such payment within fifteen days, the court may, in lieu of making a decree for ejectment, pass an order relieving the lessee against the forfeiture; and thereupon the lessee shall hold the property leased as if the forfeiture had not occurred."

The present suit was filed by the respondent on the 21st of January, 1954. After a number of hearings had been gone through, it was fixed for final hearing on the 21st February, 1955. It was on that day that the defendants for the first time gave up all the pleas and claimed benefit of section 114 of the Transfer of Property Act. Even then they did not deposit the full amount of arrears of rent together with costs and interests though they had obtained tenders twice for depositing such amount. The courts below were of opinion that in order to entitle the defendants to invoke section 114 of the Transfer of Property Act in their favour, they should have deposited the entire amount of arrears of rent which was due from them up to the 21st of February, 1955. The contention advanced before us on behalf of the defendants-appellants is that the notice, dated 22nd of November, 1953, given by the landlord having determined their tenancy with effect from 20th December, 1953, they became trespassers thereafter. The amount due from them after the 20th December, 1953, cannot, therefore, be termed as arrears of rent. What section 114 of the Transfer of Property Act requires is that the tenant should deposit "the rent in arrears, together with interest thereon, and his full costs of the suit". The contention of the appellants' counsel is that the tenancy having been dissolved by notice, the tenant thereafter became liable only for damages for use and occupation of the premises

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and not for rent. Under the circumstances, the deposit of the amount made on behalf of the tenant should be deemed to be a sufficient compliance with the provisions of section 114 of the Transfer of Property Act.

We are not inclined to accept this interpretation of the term "rent" in section 114 of the Transfer of Property Act. It appears to us that while using the term "rent" in this section the idea of the Legislature was to disregard all defaults and breaches on the part of the tenant and to treat him as a full-fledged tenant for the purposes of the suit This section is designed to provide a relief against forfeiture. It, therefore, uses terms and phrases on the assumption that no forfeiture has taken place and the tenancy between the parties has continued to subsist. Thus for example the tenant is described in the section as a lessee although, as a result of the notice given by the landlord, the tenancy has been dissolved and the tenant has, therefore, ceased to be a lessee. If, therefore, this section is interpreted in the manner suggested on behalf of the appellants and the notice of ejectment given by the landlord is deemed to be effective for the purposes of section 114 of the Transfer of Property Act, the word "lessee" used therein will not cover a person whose tenancy has been determined. On this interpretation, therefore, the defendants would be out of court and would not be able to avail themselves of this section which is relied on by them. The defendants cannot have it both ways.

The relief against forfeiture provided in this section is obviously based on equitable principles. The purpose of this section appears to be to extend a special indulgence in favour of a tenant who is prepared to purge himself of his conduct as a persistent defaulter by making an honest offer to clear off his entire liability. His unconditional readiness to wipe off his legal dues

is, therefore, made a condition precedent to his prayer that the court might invoke this section in his favour. A more reasonable construction of this section would, therefore, be to interpret the word "rent" in such a manner as to include in it the entire amount which the tenant would be liable to pay to the landlord by way of rent up to the date of tender. In other words, his liability for rental dues will be determined on the supposition that he had continued to remain as tenant and the forfeiture of his rights following the purported determination of his tenancy had not taken place. This interpretation would also be borne out by the fact that under this section the legislature required the tenant not only to pay up the arrears of rent but also interest as well as full costs of the suit. It would, therefore, appear that this section seeks to make the tenant liable even for the payment of amounts liability in respect of which is incurred by him as a result of the suit or during its pendency. The view taken by us would also find support from *Dhurrumtolla Properties, Ltd.* v. *Dhunbai Peroshaw* (1). According to the view taken in some Madras cases even the amount which is barred by the law of limitation should be included in the amount deposited by the tenant, vide *Vasudeva Udpa* v. *Krishna Upda* (2), *Gurpur Vamana Pai* v. *Venkatu Naika* (3) and *Janab Vellathi* v. *Smt K. Kadervel Thayammal* (4).

We would, therefore, hold that the tender made by the tenant being insufficient, he cannot avail himself of the benefit of section 114 of the Transfer of Property Act.

The matter can, however, be approached from another angle also. The lower courts have rejected the prayer

(1) A. I. R. 1931 Cal. 457.
(2) A. I. R. 1931 Mad. 42[illegible].
(3) A. I. R. 1936 Mad. 116
(4) A. I. R. 195[illegible] Mad. 2[illegible].

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made on behalf of the appellants as they were not inclined to exercise the discretion vested in them under section 114 of the Transfer of Property Act in their favour. They were of the opinion that the tenants had in the present case forfeited any claim to any equitable consideration at the hands of the court as a result of their conduct. The relief itself being an equitable one, the party who comes to court seeking such relief must come with clean hands. In the present case the suit was filed on the 21st of January, 1954. Both the appellants contested the suit on a large number of grounds. They did not claim the benefit of section 114 of the Transfer of Property Act on the first hearing of the suit. On the 7th of July, 1954, both the defendants applied for time to file their written statements, Issues were framed on the 11th of August, 1954 and 13th of August, 1954, was fixed for the hearing of issue no. 3 which related to the valuation of the suit and to the sufficiency of court-fee. After this issue was decided, 9th of December, 1954, was fixed for final hearing. On that date the suit was adjourned to 21st of February, 1955, for final hearing upon the ground of illness of appellant no. 2. It was on the 21st of February, 1955, that for the first time all the pleas taken by the appellants were given up and they claimed benefit of section 114 of the Transfer of Property Act. Even then they did not deposit the full amount of arrears of rent together with costs and interest, though they obtained tenders twice for depositing such amount. The appellants, therefore, took all kinds of unnecessary vexatious and frivolous pleas thereby delaying the disposal of the suit and causing harassment to the respondent. It may also be noted in this connection that in the present case regular payment of rent was one of the terms of the lease. The lessee, therefore, held the land which belonged to the plaintiff on the express condition that rent in res-

pect of the same would be paid regularly, and, in the event of default, he was liable to incur the penalty of having to vacate the premises. In the present case, therefore, the parties themselves had attached special importance to the term relating to regular payment of rent and had also prescribed a penalty for its breach. Under the circumstances, in the present case, the court while decreeing the suit for ejectment is merely enforcing a term which was a consideration of the contract between the parties and which was agreed to by the tenant himself. The defendants have been found to be clearly in persistent default for over three years. Their conduct throughout cannot be said to be either above board or honest. The trial court, therefore, thought that it was not a fit case for the exercise of the discretionary power of the court in favour of the appellants. The findings of the trial court in this regard were upheld concurrently by two courts. Their conclusions cannot be characterised as either perverse or unreasonable. At any rate, the court will be loathe to interfere with the exercise of a discretionary power at this late stage. For this reason also we are of opinion that the plea of the appellants based on section 114 of the Transfer of Property Act must be repelled.

We, accordingly, see no substance in this appeal and dismiss it with costs.

Appeal dismissed.

CRIMINAL REVISION

Before Mr. Justice Mathur

1961
March, 29

THE MUNICIPAL BOARD, BIJNOR

v.

BHIM SINGH

Code of Criminal Procedure, 1898, *ss.* 9, 435—*Court of Assistant Sessions Judge, whether distinct from that of Sessions Judge—Whether the court of an Assistant Sessions Judge an inferior criminal court to that of Sessions Judge—High Court, whether will entertain a criminal revision direct against the order of an Assistant Sessions Judge passed in appeal.*

By s. 435 of the Code of Criminal Procedure the High Court or any Sessions Judge may call for and examine the proceeding before any inferior criminal court to satisfy itself or himself as to the correctness, legality on propriety of any finding, sentence or order.

The High Court, as a rule, does not entertain criminal revisions unless the Sessions Judge had, first been approached in this regard, the rule however may be relaxed in special cases.

Where an Assistant Sessions Judge disposed of an appeal on a transfer from a Sessions Judge, the question arose whether a revision against the order of the Assistant Sessions Judge could be filed direct to the High Court without the Sessions Judge being approached in this regard in the first instance.

Held, that the Court of Sessions is for certain purposes divisible into many courts one presided over by the Sessions Judge or Additional Sessions Judge and another by an Assistant Sessions Judge. For the purposes of s. 435 of the Code of Criminal Procedure the court of the Assistant Sessions Judge is distinct from that of the Sessions Judge where an appeal is transferred to an Assistant Sessions Judge it shall be a proceeding before the Assistant Sessions Judge and not before the Sessions Judge. Further the Court of an Assistant Sessions Judge is an inferior criminal court to that of the Sessions Judge. Consequently the Sessions Judge can entertain a revision against an order of an Assistant Sessions Judge even though passed in the exercise of an appellate jurisdiction.

The High Court would, accordingly, not entertain an application in revision directly against the order of an Assistant

sessions Judge unless the Sessions Judge had first, been approached in this regard.

Case-law discussed.

Criminal Revision no 1502 of 1960 against the order of Sachidanand, Assistant Sessions Judge, Bijnor, dated 22nd June, 1960.

The facts appear in the judgment

Shanti Bhushan for the applicant.

MATHUR, J.—This order governs Criminal Revisions nos. 1502 to 1505 of 1960 by the Municipal Board of Bijnor against the judgments of Sri Sachidanand, Assistant Sessions Judge, Bijnor, whereby Criminal Appeals preferred by Bhim Singh, Baldeo Singh Kishore and Kailash Chandra *alias* Munnoo were allowed. The Criminal Revisions were presented before me as Application Judge on 6th September, 1960, with office reports, dated the 31st August, 1960. The office did not make a note that the revisions were being presented in court directly without first of all approaching the Sessions Judge. This fact was also not brought to the notice of the Application Judge, but the facts as detailed in the hearing of the revisions would have indicated that no revision had been made before the Sessions Judge and the applicant was challenging the order of discharge directly before the High Court. It cannot, therefore, be said that the applicant was guilty of, or was in any way responsible for concealment of facts. The fact, however, remains that the order of admission was passed without the court being informed, in clear words, that no revision had been filed before the Sessions Judge. The applicant cannot, therefore, escape the responsibility for improper admission of the revisions, but it was mentioned by the learned Advocate that he was under the impression that no revision lay before the Sessions Judge as his was a court of co-ordinate jurisdiction as far as Criminal Appeals were

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concerned and consequently the revisions were filed directly before the High Court and it was not brought to the notice of the Application Judge that such a recourse was being adopted.

An order passed in a criminal proceeding can be modified or quashed in exercise of the inherent powers under section 561-A, Criminal Procedure Code This section clearly provides—

> "Nothing in this Code shall be deemed to limit or affect the inherent power of the High Court to make such orders as may be necessary to give effect to any order under this Code, or to prevent abuse of the process of any court or otherwise to secure the ends of justice."

The first and the last clauses of section 561-A, Criminal Procedure Code are not applicable to the facts of these cases. In other words, this Court would be justified to vacate the orders, dated the 6th September, 1960, and to reject the revisions on the ground that the Sessions Judge had not first been approached only if it is necessary to prevent abuse of the process of the court. If the applicant was guilty of concealment of material facts or was not acting in good faith when full facts were not detailed in the petition, this court would have been justified to interfere by vacating the orders already passed so that no one may dare to approach this Court with incomplete facts. As already mentioned above the present cannot be said to be cases in which the applicant was guilty of concealment of facts. It is a different thing that if it was noticed that the Sessions Judge had not been moved, the revisions may not have been admitted; but it is likely that if the revisions were being summarily dismissed on the above technical ground, the learned advocate for the applicant would have argued that no revision lay before the Sessions

judge. This point has been argued before me in detail and consequently it is possible that the revisions may have been admitted so that this question may be decided by this Court for the guidance of the litigants, the members of the Bar and also the subordinate courts. To put it differently, the present are not the cases in which this Court may exercise its inherent jurisdiction under section 561-A, Criminal Procedure Code to quash the orders of admission, dated the 6th September, 1960.

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The above view cannot be said to be in disregard of the practice of this Court. In the Full Bench case of *Shailabala Devi* v. *Emperor* (1) the revision was disposed of on merits after rejecting the preliminary objection raised by the Government Advocate, even though no revision had been filed before the Sessions Judge. Sulaiman J. observed, after consideration of the case law, that in most of the cases the High Court did not consider the objection fatal after the application had been admitted and record called for, all the more, when the case had been pending for a long period, which in that case was not more than six months. MUKERJI, J. made observations for the guidance of the members of the Bar and the litigants in general and in that connection suggested that the special grounds for moving the High Court directly should be indicated in the petition or disclosed by the applicant or his counsel at the time of the admission of the revision. KING, J. observed that it could be presumed that the Judge who admitted the application was aware of the rule of practice but decided that special grounds had been shown for making an exception to the general rule. Even though it was laid down that the well established practice of this Court and also of other High Courts was not to entertain a revision under section 435, Criminal

(1) A. I. R. 1933 All. 378.

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Procedure Code unless the Sessions Judge had, first of all, been approached, yet it was made clear that that was a rule of practice and not the law. As far as the revisional jurisdiction was concerned, both the High Court and the Sessions Judge had concurrent jurisdiction and in exceptional cases the High Court could entertain a revision application even though the subordinate court had not first of all been approached. Revision applications made direct to the High Court were thus entertained as there was no illegality and there was a mere departure from the rule of practice.

The present revision applications were admitted more than six months back and they were listed for hearing before BROOME, J. and were thereafter listed before me for consideration whether the orders of admission be vacated or not. This question has been thrashed out in detail and in fact was argued on two days. When this court had already devoted considerable time over these applications, it will be in fairness that we may devote some more time and dispose them of on merits instead of directing the parties to incur additional expenses by having to go before the Sessions Judge and then to contest the proceeding before the High Court. I find no reason to depart from the view expressed in the Full Bench case of *Shailabala Devi* v. *Emperor* (1).

As the points raised before me are of great importance all the more, when there is no decision of this Court directly on the point, it is but proper that I should indicate in this order whether the Sessions Judge has the jurisdiction to entertain a revision under section 435, Criminal Procedure Code against an order of the Assistant Sessions Judge passed in the exercise of original or appellate jurisdiction.

(1) A.I.R. 1939 All. 678.

Section 435, Criminal Procedure Code provides—

> "The High Court or any Sessions Judge or District Magistrate or any Sub-Divisional Magistrate empowered by the State Government in this behalf may call for and examine the record of any proceeding before any inferior Criminal Court situate within the local limits of its or his jurisdiction for the purpose of satisfying itself or himself as to the correctness, legality or propriety of any finding sentence or order recorded or passed, and as to the regularity of any proceedings of such inferior court. . . . ."

The criminal appeals disposed of by the Assistant Sessions Judge under orders which are subject of revision in the present proceedings were against orders passed by a Magistrate Second Class All the criminal appeals were presented in the Court of Session and the Sessions Judge had transferred them to the Assistant Sessions Judges for disposal. In other words, when the Assistant Sessions Judge allowed the appeals and discharged the opposite-parties, he was exercising an appellate jurisdiction. The points for consideration are whether the Assistant Sessions Judge was in the eye of law functioning as a distinct criminal court, secondly, can it be deemed to be an inferior criminal court and thirdly whether the appeals were a proceeding before an inferior criminal court?

The term "Court" or "Criminal Court" has not been defined in the Code of Criminal Procedure; but section 6 thereof enumerates the various criminal courts Besides the High Courts and the courts constituted under any law other than the Code of Criminal Procedure there are five classes of criminal courts, namely—

I. Courts of Session;

II. Presidency Magistrates;

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III. Magistrates of the first class;

IV. Magistrates of the second class; and

V. Magistrates of the third class.

The court of the Assistant Sessions Judge, could, without any controversy, be placed in the first category if there was no provision in section 9 of the Code for the establishment of "a Court of Session" for every sessions division The words" a Court of Session" will make it clear that there can be only one Court of Session for every sessions division. Consequently, there is in the eye of law only one Court of Sessions for every sessions division, though such court may be presided over by the Sessions Judge, Additional Sessions Judge or Assistant Sessions Judge. The formation of the Court of Sessions is similar to the High Court with the difference that the High Court is constituted of Judges exercising similar judicial powers, though under the rules of the court certain work can be laid before a single Judge and others before a Division Bench or a Full Bench. In the case of Court of Session however, the Sessions Judge and Additional Sessions Judges exercise similar judicial powers, but the powers of Assistant Sessions Judges' are less. Assistant Sessions Judges cannot award the sentence of death, imprisonment for life or a sentence exceeding 10 years. They cannot hear criminal revisions and also criminal appeals against the judgments of Assistant Sessions Judges and Magistrates first class

It was, contended that when there was only one Court of Sessions the Assistant Sessions Judge was asmuch a part of the court as the Sessions Judge and consequently the court presided over by the Assistant Sessions Judge could not be deemed to be a court by itself, his court and the court of the Sessions Judge being the same. It was thus suggested that when the Court of the Sessions

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Judge and that of the Assistant Sessions Judge was the same, the Sessions Judge could not in any way revise or make a recommendation for the revision of an order passed by one of the presiding officers of his court. This contention can succeed only if for all purposes the court is one and it is not possible to sub-divide it into many courts for any purpose. In *Deoki Nandan v. State of U. P.* (1) the view expressed was as has been suggested by the learned counsel for the applicant, namely, that the High Court is constituted as one court and within the meaning of clause (1) of Article 133 of the Constitution of India, the Single Judge could not be deemed to be a court immediately below the Bench constituted for hearing special appeals. A contrary opinion has been expressed by the Bombay and Calcutta High Courts in *Krishnaji Vithal Kangutkar v. Emperor* (2) and *Parbati Devi v. The State* (3), but they were the cases where the exercise of revisional jurisdiction by the High Court in cases decided by the same court in the exercise of its original criminal jurisdiction was in issue. On consideration of the provisions of the Code of Criminal Procedure it was held by the Bombay High Court that a revision under section 435, Cr. P. C. was maintainable before a Bench of the High Court, where a Single Judge in the exercise of its original criminal jurisdiction passed a non-appealable sentence. In the Calcutta case the convicted person had preferred an appeal and it was under consideration whether the court could exercise revisional jurisdiction under section 439, Cr. P. C.

The decision in *Deoki Nandan v. State of U. P.* (1) cannot, in view of the Supreme Court decision in *Narain Das v. State of Uttar Pradesh* (4), be said to enunciate the law correctly, in any case as

(1) A.I.R. 1959 All. 10
(2) A.I.R. 1942 Bom. 29
(3) A.I.R. 1952 Cal. 535
(4) 1961 A.L.J. (S.C.) 135

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applicable to proceedings under the Code of Criminal Procedure. In this case their Lordships considered the scope of sections 195, 476 and 476-B of the Code of Criminal Procedure, to lay down whether an order of a Single Judge of the High Court under section 476, Cr P. C. was appealable before the High Court itself under clause 10 of the Letters patent or before the Supreme Court. On consideration of the wording of section 195, Cr. P C. it was held that the Bench of the High Court consisting of a Single Judge was a court subordinate to the Bench of the same court competent to entertain appeals against the appellant decrees or sentences of such court. The order under section 476, Cr. P. C. was passed in a civil writ petition under Article 226 of the Constitution and a final order passed in the writ petition was appealable under clause 10 of the Letters Patent. The decree passed in the writ petition was appealable before the High Court. It was thus held that within the meaning of section 195 (3) Cr. P. C. the Bench of the High Court consisting of a Single Judge was subordinate to a Bench of the High Court to which an appeal lay from the appellate decree of the Single Judge. It is now a settled law that even though the court is one and all the Judges individually have the same power, for certain purposes they shall be deemed to be more than one court. There would be the Court of a Single Judge and the Court of a Bench of two Judges or more. When for certain purposes the High Court can be deemed to consist of more than one court, even though in fact the High Court is one and is constituted of Judges having the same powers, there is no reason why a similar view be not adopted with regard to a Court of Session constituted under section 9 of the Code of Criminal Procedure.

In the case of a Court of Session, all the Judges do not have the same power. The powers of Assistant Sessions

Judges are less. Under section 408, Cr. P. C. a person convicted on a trial held by an Assistant Sessions Judge can appeal to the Court of Session. Consequently, section 408, Cr. P. C. by itself provides that there is a court presided over by an Assistant Sessions Judge which for purposes of appeal is distinct from the court of the Sessions Judge to whom the order passed by the former is appealable. Under the proviso to the section the appeal shall lie to the High Court if the sentence of imprisonment awarded exceeds for years. This will also suggest that the Court of Session is for certain purposes divisible into many courts, one presided over by the Sessions Judge or Additional Sessions Judge and another by Assistant Sessions Judge. When a Court of Session constituted for the sessions division can be subdivided, we can easily hold that for purposes of section 435, Cr. P. C. the court of the Assistant Sessions Judge is distinct from the Court of the Sessions Judge. To make this point more clear it may further be observed that the framers of the Code of Criminal Procedure have made a differentiation between a Court of Session and the Sessions Judge, Additional Sessions Judge or Assistant Sessions Judge. Wherever a provision is made for the commitment of a case or for filing an appeal or revision it is laid down that the commitment shall be made to or the appeal or revision shall be filed before the Court of Session; but wherever a provision is made for the hearing of the case by the Judges of the three categories, they have been referred to as the Sessions Judge. Additional Sessions Judge or Assistant Sessions Judge. In other words, therefore, though, legally speaking, there is only one Court of Session, there are, for purposes of administration of justice, as many courts as there are Sessions Judges in the district. One court shall be presided over by the Sessions Judge, others by Additional Sessions Judges and the rest by Assistant Sessions Judges.

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Thus, for purposes of section 435, Cr. P. C. the Court of an Assistant Sessions Judge shall be distinct from that of the Sessions Judge.

When an appeal is transferred to an Assistant Sessions Judge, it shall from that stage be a proceeding pending in the Court of the Assistant Sessions Judge, irrespective of any order which the Sessions Judge may have himself passed at an earlier stage. At whatever stage the appeal is transferred to an Assistant Sessions Judge, the further hearing of the appeal by the Assistant Sessions Judge shall amount to a proceeding pending in his court.

The last point for consideration is whether the court of an Assistant Sessions Judge exercising appellate jurisdiction in appeals presented before the Court of Session and later transferred to the Assistant Sessions Judge can be regarded as an inferior criminal court.

Section 435 of the present Code corresponds with section 295 of the Code of 1872 and in that section the words used were "any court subordinate to such Court or Magistrate". These words were replaced in section 435, Cr. P. C. by "an inferior Criminal Court." It must, therefore, be presumed that the legislature altered the law for some well defined purpose; in other words, the scope of section 435, Cr. P. C. cannot be restricted to orders passed by courts subordinate to the court exercising revisional jurisdiction.

The meaning of the word "inferior" in its application to the Court of Magistrates (but not of the Court of Assistant Sessions Judge) was considered by our High Court in *Queen Empress* v. *Laskari* (1). Calcutta and Bombay High Courts have also adopted the same view. In *Queen Empress* v. *Laskari* (1) it was observed that the word "inferior" had been used in the new Code to meet the rulings to the effect that the District Magistrate was not subordinate to the Sessions Judge and it

(2) (1885) I.L.R. 7 All. 958.

was held that because the Magistrate First Class was subordinate to the District Magistrate, the latter was competent to call for the record of the former and to deal with it under section 435, Cr. P. C. The Court of a Subordinate Magistrate was thus held to be an inferior criminal court. In *Nobin Kristo Mookerjee* v. *Rissick Lall Laha* (1) the words "inferior criminal court" in section 435 Cr. P. C. were construed to mean inferior regarding the particular matter in respect to which the superior court was asked to exercise its revisional jurisdiction; but this decision was over-ruled in the Full Bench reference *Opendro Nath Ghose* v. *Dukhini Bewa* (2) where ordinary meaning was assigned to the word "inferior", and it was held that there could be no controversy with regard to subordinate courts or authority and that all subordinates were inferior to the authority to which they were subordinate. It was at the same time observed that an inferior court or authority was not necessarily subordinate to the superior court or authority. Similar observations were made in *Queen Empress* v. *Pirya Gopal* (3). In other words, subordination implies inferiority and for purposes of section 435, Cr. P. C. a subordinate court or authority can be classed as an inferior criminal court.

It is, however, urged that this rule cannot apply to Assistant Sessions Judges, as in the eye of law there is one Court of Session though presided over by many Sessions Judges including Assistant Sessions Judges, and, on the other hand, there are as many Courts of Magistrates as there are Magistrates posted in the district. The suggestion made is that the provisions of section 435, Cr. P. C. should be interpreted differently while considering the case of Assistant Sessions Judges. Such a view if adopted, shall be contrary to the principles governing interpretation of statutes, as we shall be compelled to

(1) (1884) I.L.R. 10 Cal. 968. (2) (1886) I.L.R. 12 Cal. 479.
(3) (1888) I.L.R. 9 Bom. 100.

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give two conflicting meanings to the same provisions of the statute. The legislature and not the courts of law has the power to make a reasonable classification, that is, to apply the law to one set of persons and not to others, or to lay down one law for one set and a different one for the other. Where the legislature makes one law to be applicable to all, the courts cannot interpret the same enactment in two different manners, one meaning to be assigned when considering the case of Magistrates and a different one to the case of the Assistant Sessions Judges.

A subordinate court or authority occupies an inferior status and consequently an important rule for determination whether a particular court can be classed as an inferior criminal court, is whether that court is subordinate to the court or authority which can exercise the revisional jurisdiction under section 435, Cr. P. C. Section 17(3) Cr. P. C. clearly lays down that all Assistant Sessions Judges shall be subordinate to the Sessions Judge in whose court they exercise jurisdiction and, therefore, the Court of an Assistant Sessions Judge is an inferior criminal court as far as the Court of Session or the Sessions Judge is concerned.

Another rule which can, at occasions be applied in determining whether a criminal court is inferior to the Sessions Judge, is to whom appeals ordinarily lie against the judgment or order of the former court. Superior court is one which exercise higher powers and can sit in judgment over the decisions of the inferior court. The legislature itself made a provision in section 435, Cr. P. C. by laying down that for purposes of this section the Courts of Magistrates shall be inferior to the Sessions Judge, that is, the Sessions Judge can exercise revisional jurisdiction when orders of Magistrate are challenged. The same rule can also be applied to Assistant Sessions Judge. Under section 408 Cr. P. C. an appeal against the judgment of an Assistant Sessions Judge lies to the

Court of Session unless, of course, the sentence awarded exceeds four years. Appeals against the judgments of Assistant Sessions Judges can be heard by the Sessions Judge or by the Additional Sessions Judges. The ordinary rule laid down in section 408 Cr. P. C. therefore, is that appeals against the decisions of the Assistant Sessions Judges shall lie to the Sessions Judge, though in exceptional circumstances the appeals shall lie to the High Court. Consequently, for all practical purposes, the Court of an Assistant Sessions Judge is an inferior criminal court with reference to the Sessions Judge.

The learned counsel for the applicants has, however, urged that the above rules can be applied to only those courts which do not exercise a concurrent jurisdiction over the subject-matter in dispute, that is, the matters sought to be revised by the higher court in exercise of the revisional jurisdiction under section 435, Cr. P. C. The suggestion thus made is that inferiority or superiority of the court should depend upon the subject-matter of the decision of the court and not by its exercising less powers or being subordinate to another court, in other words the court is not inferior when both the courts exercise concurrent jurisdiction in that matter. Such was the view expressed in *Nobin Kristo Mookerjee* v. *Russick Lall Lala* (1) but this decision has been overruled by a Full Bench of the same High Court. Further, the adoption of such a view will lead to an anamolous situation, namely, that we shall be applying different rule to Assistant Sessions Judges; a rule which cannot be applicable to Magistrates. Magistrates First Class and District Magistrates have the same original jurisdiction in other words, a case which is being tried or has been tried by a Magistrate first class could also be tried by the District Magistrate and appeals against the decisions of both would lie to the Court of Session. If the inferiority of the court depended upon the subject matter of

(1) (1884) I.L.R. 10 Cal. 918.

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the criminal proceedings, the Court of a Magistrate first class shall be deemed to be subordinate or inferior to that of the District Magistrate in so far as the original trials are concerned and a revision against an order of a Magistrate first class cannot lie before the District Magistrate. The legislature did not have such an intention when it enacted section 435 Cr. P. C. The above rule cannot, therefore, be applied to Magistrates. For this reason, it will not be proper to make this rule applicable to the Court of Assistant Sessions Judges.

To sum up, a Criminal Court 'A' is, for purposes of section 435, Cr. P. C., inferior to another criminal court 'B', if 'A' is subordinate to 'B' or appeals against the decisions of 'A' lie to the court 'B' further, even though under section 9 Cr. P. C. there is only one Court of Session for every sessions division, there are, for purposes of administration of justice, as many courts as there are Sessions Judges including Additional Sessions Judges and Assistant Sessions Judges, and the Court of an Assistant Sessions Judge shall be regarded as distinct from the Court of the Session Judge or Additional Sessions Judge An Assistant Sessions Judge is subordinate to the Sessions Judge [vide section 17 (3) Cr. P. C.] and consequently, for the exercise of revisional jurisdiction the Court of an Assistant Sessions Judge is an inferior criminal court and the Sessions Judge can entertain revisions against the orders of the Assistant Sessions Judge even though passed in the exercise of appellate jurisdiction. It is the long standing practice of this court and also of other High Courts not to entertain a revision application directly. The aggrieved party has, first of all to approach the Sessions Judge who shall either make a reference to the High Court or dismiss the revision. If the party does not feel satisfied with the order of the Sessions Judge, he can then invoke the revisional jurisdiction of the High Court. But where the High Court entertains a revision directly

without the party having approached the Sessions Judge, there would be no illegality, but a mere departure from the above practice. Further, where the party was not guilty of concealment of material facts, it will not be desirable to set aside the order of admission of the revision, even though the Judge may not have admitted the revision if it was brought to his notice that the party had not approached the Sessions Judge. In any case where the revision has remained pending before the High Court for many months, it will not be desirable to vacate the order of admission already passed.

It was on account of the incomplete report submitted by the office that it did not come to the notice of the Application Judge that the party had not approached the Sessions Judge before moving the High Court in revision. It is, therefore, necessary to lay down directions for the guidance of the office so that no revision may in future be admitted without the Judge being aware of all the relevant facts. The office should continue to submit a report on limitation and also whether the revision application has been moved by a party to the proceeding or by an outsider. In addition, the office should report whether the applicant had approached the Sessions Judge and on which date did the Sessions Judge dismiss the revision application. If the Reader finds that the report is incomplete, he shall ascertain facts from the applicant or his advocate presenting the application and bring full facts to the notice of the Application Judge. It will be desirable that the members of the Bar should make a note in the application in clear words whether the Sessions Judge has been approached, and if not, why the High Court is being approached directly.

The revisions should now be listed before the Bench concerned for final hearing

Order accordingly.

APPELLATE CIVIL

Before the Hon'ble M. C. Desai, Chief Justice and Mr. Justice Dwivedi.

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May, 19

RAM DAS (APPELLANT)

v.

SRI LACHHMAN JANKI AND OTHERS (RESPONDENTS)

Forfeiture of lease *by denial of title—Rule of, whether applicable to lessor's assignee—Denial of title and* bona fide *putting assignee to proof of title—Distinction between—General principles on forfeiture—Transfer of Property Act,* 1882, *s.* 111(*g*).

The law on forfeiture of lease by denial of title applies not only to denial of lessor's title but also to that of his successor-in-interest with this difference that the initial contract of lease in the latter case, being not with the assignee himself but with his predecessor-in-interest, the lessee is entitled *bona fide* to put the assignee to proof of his title. The question whether what the lessee has said or done amounts to denial of title or simply requiring proof of it must depend and be decided on the facts of each case in the light of general principles, viz. (i) law leans against forfeiture, (ii) onus of proving forfeiture rests on the lessor, (iii) denial of title must be unequivocal and (iv) where denial of title is in writing, the document must be construed as a whole without undue emphasis on parts thereof.

Held, reversing the judgment of CHATURVEDI, J. in *Ram Das* v. *Sri Ram Lakshman Janki* (1) that the facts of this case were more susceptible to the construction that the lessee had simply put the assignee to proof of her title than that he had denied her title and there was, therefore, no forfeiture of lease.

Abdulla v. *Mohammad Muslim* (2) disapproved.

Special Appeal no. 44 of 1958 from a decision of CHATURVEDI, J., in Second Appeal no. 879 of 1949 decided on 5th August, 1958.

The facts appear in the judgment.

K. B. Asthana, for the appellant.

Gopi Nath Kunzru and *A. N. Kaul*, for the respondents.

(1) A.I.R. 1958 All. 797. (2) A.I.R. 1926 Cal. 1205.

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Das

The judgment of the court was delivered by—

DWIVEDI, J.:—By our order, dated 28th April, 1961, we decided this appeal but we reserved reasons for the order. We are now setting forth the reasons.

The dispute relates to house no. 76/100 situate in Coolie Bazar, Kanpur. It belonged to one Srimati Janki Kuer. She was the absolute owner. The appellant was her tenant. On 2nd June, 1946, she executed a will whereby she bequeathed the house to the 1st respondent. Durga Prasad through whom the first respondent instituted the suit culminating in this appeal was one of the Sarbarakars of the first respondent. Srimati Janki Kuer died on 6th June, 1946. Sometime after her death the first respondent instituted suit no. 920 of 1947 in the Court of the Judge of Small Causes at Kanpur for arrears of rent against the appellant. In the suit the appellant filed a written statement apparently denying the first respondent's title to the house. The Judge of the Court of Small Causes returned the plaint since a question of title to immovable property was involved in the suit. After the return of the plaint on 28th July, 1947, the respondent no. 1 served a notice on the appellant terminating his tenancy on the ground of forfeiture of tenancy rights. The appellant refused to quit and the first respondent instituted a suit for his ejectment. The suit was founded on two grounds, namely, (1) that the appellant had denied the first respondent's title in his written statement in the earlier suit and had consequently forfeited his tenancy rights, and (2) that the appellant had committed wilful default in the payment of rent. The appellant controverted the allegations in his written statement and claimed that he had not incurred forfeiture of his tenancy rights and that he had not committed wilful default in the payment of rent. He admitted that he had taken the house on

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rent from Srimati Janki Kuer but pleaded that after her death Srimati Vidya Wati, one of the respondents in this appeal, took possession of her properties alleging herself to be her daughter and that he had in good faith paid a sum of Rs.108 to her as advance rent for a year. He did not admit that the alleged will was executed by Srimati Janki Kuer in favour of the respondent no. 1.

The Munsif, who heard the suit, held that the will was not a genuine document and appeared to be forged and that the 2nd respondent was, therefore, the owner of the property in suit as an heir of Srimati Janki Kuer. He also held that the appellant had paid advance rent for one year to the third respondent. In view of his first finding, he did not express any opinion on the question whether the appellant had forfeited his tenancy rights. But he was of the opinion that the denial by him of the first respondent's title was *bona fide*. In view of these findings he dismissed the suit.

On appeal the Civil Judge held that the will in favour of the first respondent was a genuine and valid will. Differing again from the Munsif he also held that the appellant had forfeited his tenancy rights by denying the title of the first respondent in the rent suit. He, therefore, allowed the appeal of the first respondent and decreed its suit for possession of the house.

Feeling aggrieved with the judgment and decree of the Civil Judge the appellant preferred a second appeal in this Court. The appeal was heard by CHATURVEDI, J., before him the appellant did not challenge the correctness of the finding of the Civil Judge that the will in favour of the first respondent was a genuine and valid will. Second finding of the Civil Judge that the appellant has forfeited his tenancy rights was, however, vehemently assailed. Two arguments were advanced on his behalf. Firstly, it was argued that the denial by the

tenant of the title of an assignee or an heir of the former landlord did not invite forfeiture of tenancy rights under section 111(g) of the Transfer of Property Act (hereinafter called the Act). Secondly, it was argued that taking all the circumstances and facts into consideration the averment of the appellant in the written statement filed in the rent suit could not be interpreted as denying the title of the first respondent to the house. Both the arguments were found to be untenable by the learned Judge, and he arrived at the conclusion that the appellant had forfeited his tenancy rights by denying the title of the first respondent in his written statement in the rent suit. He was also of the view that his denial was not *bona fide*. Accordingly he dismissed the appeal, but granted leave to appeal to a Division Bench. The present appeal has been preferred in pursuance of the leave granted by the learned Judge.

The judgment under appeal is reported in *Ram Das* v. *Sri Ram Lakshman Janki* (1).

Learned counsel for the appellant has urged before us that clause (g) of section 111 of the Act does not apply to a case where, as here, the lessee admits the title of his lessor and denies only the title of his lessor's transferee to the demised property. Drawing our attention to the material words of that clause, which are—

> "In case the lessee renounced his character as such by setting up a title in a third person or by claiming title in himself."

he submitted that there was no express or implied reference in these words to the transferee of the lessor. In support of his argument he also relied upon a decision of the Calcutta High Court in *Abdulla* v. *Mohammad Muslim* (2).

(1) A.I.R. 1953 All. 787. (2) A.I.R. 1926 Cal. 1292

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A lessor has certain primary and auxiliary rights in the demised property. One of the primary rights is the right of evicting the lessee from the property in certain circumstances, and as an auxiliary to that right there springs the right to give notice in writing to the lessee of intention to determine the lease and to ask the lessee to quit the property. Section 109 of the Act provides that, if the lessor transfers the property leased, or any part thereof, or any part of his interest therein, the transferee, in the absence of a contract to the contrary, shall possess all the rights of the lessor as to the property or part transferred so long as he is the owner of it. We think that it follows from this section that all the rights, primary and auxiliary, of the lessor to the property stand transferred to his transferee, and the latter becomes substituted for the former. In plain language he becomes for all practical purposes the lessor. The proviso to section 109 also makes this position clear, for, if the transferee does not become the lessor, how he can be entitled to receive the rent from the lessee. Clause (*g*) of section 111 says that when there is a forfeiture of tenancy rights, the lessor or his transferee may give notice in writing to the lessee of his intention to determine the lease. Put at its highest, the word 'transferee' in the clause may be construed to give impliedly a power to the transferee of the lessor to determine the lease on account of the lessor forfeiting his tenancy rights during the period of his ownership of the demised property; put at its lowest, the word may be construed to empower the transferee of a lessor to determine the lease when a lessee has forfeited his rights during the period of his lessor's ownership of the demised property. Even if the latter meaning is the correct meaning, we fail to understand why a transferee of a lessor, who gets the right of determining the lease for forfeiture of tenancy rights incurred during his predecessor-in-interest's ownership of the demised property, should not get a

right to determine the lease when the lessee from his predecessor-in-interest incurs forfeiture of his tenancy rights during his ownership of the demised property, for after all the source of either right of his is to be found in section 109, which provides that all rights of the lessor shall pass to him on transfer of the demised property. Section 111 indicates the various circumstances in which a lease is determined; one of them is by forfeiture. The section is worded in a general language which is apt to extend to the lessor as well as his transferee, and there appears to be no sensible reason why the extensive scope of the section should be cut down and limited to the lessor only. For instance, it stands to reason that the lease should stand determined not only when the interest of the lessee and the lessor in the whole property become vested at the same time in the lessee but also when the interest of the lessee and the transferee of the lessor in the whole of the property become vested in the lessee. [*See* clause (*d*) of section 111]. The same will be the case with respect to other clauses of section 111. We, therefore, reject the argument of learned counsel for the appellant.

The view that we are taking is supported by several authorities [*Jones and Wife* v. *Mills* (1), *Doe d. Bennett* v. *Long* (2), *C. Venkatachariar* v. *C. Rangaswami Ayyangar* (3), *C. Rama Ayengar* v. *Anga Gurusami Chetti* (4)].

Abdulla's case (5), no doubt, goes the whole length with the argument of learned counsel for the appellant. The learned Judges said there—

> "There cannot be any doubt whatsoever that the denial of the right of an assignee from the original lessor by the tenant does not work a forfeiture of

(1) (1861) 142 E.R. 664.
(2) 173 E.R. 1047.
(3) A.I.R. 1919 Mad. 266.
(4) A.I.R. 1919 Mad. 897.
(5) A.I.R. 1926 Cal. 1205.

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the tenancy. This principle has been long settled and this cannot and is not disputed at the bar."

It may be observed that there is no discussion and no reasons are given for the view. The learned Judges have assumed that the principle has long been settled. It may also be noticed that the rule, as stated by learned Judges, was conceded at the bar to be correct. With respect to the learned Judges we are unable to agree with them.

The next argument of learned counsel for the appellant—and it is the crucial argument—is that having regard to all the circumstances of the case the appellant cannot be held to have forfeited his tenancy rights. The respondent's case of forfeiture of tenancy rights is solely founded on the appellant's written statement in the respondent's earlier rent suit no. 191 of 1946. The written statement was filed on February 12, 1947, and is Exhibit 2.

The question of forfeiture of tenancy is often beset with difficulty. There is a plethora of cases, both Indian and foreign, on the optic, but a search for an exactly applicable authority would often go un-rewarded. It is, therefore, necessary to be clear about the principles that surround and govern forfeiture of tenancy rights. Firstly, the denial of the landlord's title must be unequivocal, and absolutely definite, for the law strongly leans against forfeiture. [See *Shiam Bihari Lal Gaur* v. *Madan Singh* (1)]. Secondly, when the landlord's title is denied in writing, the writing should be construed as a whole without giving undue emphasis to one or the other part of it. The writing should be examined with a view to ascertain whether the writer really intended to renounce his character as lessee by setting up a title to the demised property in himself or in a third party. When the writing consists of a written statement,

(1) A.I.R. 1945 All. 293, 297.

we should not overlook the fact that pleadings in India are often marked by prolixity and flourish, and in interpreting pleadings due allowance should be made for these inveterate defects. Thirdly, the onus of proving forfeiture of tenancy rights lies on the landlord plaintiff. He must unambiguously prove that the lessee has directly and unequivocally repudiated his title to the demised property and has thereby lost his tenancy rights. If at the end of the day the court is left in doubt or if it takes the view that the writing, which is alleged to repudiate the title of the landlord, is equivocal, he would fail. Lastly, it is now well settled that the lessee may in good faith and for his own protection put the transferee of his lessor to strict proof of his title to the demised property before making payment to him. He has not entered into any agreement directly with him. If there are several claimants to a demised property, he must be sure who is the rightful owner thereof before he is saddled with the liability of paying rent to any one of them. In *Mountjoy* v. *Collier* (1), ERLE, J., said:

> "A tenant is liable to the person who has the real title, and may be forced to pay to him, either in an action for use and occupation, if there has been a fresh demise or an arrangement equivalent to one, or in trespass for the mesne profits. It would be unjust, if being so liable, he could not show that as a defence."

In *Jone's* case (2), it has been held that a tenant could refuse payment of rent to the successor-in-interest of his lessor until the latter proved his title to the demised property. The same principle is deducible from *Deo* v. *Cooper* (3). In *Smt. Malliku Dassi* v. *Makham Lal Chowdhry* (4), it was held that if the lessee was ignorant of the sale of the demised property by his lessor and had

(1) 4 M. & G. 143.
(2) 142 E.R. 664.
(3) (1840) 1 M. & G. 135.
(4) 9 C.W.N. 928.

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no belief in it, he could put the transferee to the proof of his title by purchase. This view was reiterated in *H. Mathewson* v. *Jadu Matho* (1). In *Hatimullah* v. *Mahamad Abju* (2), it was said that where a tenant denied *bona fide* the title of the transferee to the demised property on the ground of seeking information of his title or having such title established in a court of law in order to protect himself, he did not forfeit his tenancy rights. It was further said that where the tenant in good faith disclaimed the transferee's title not with a view to protect his own interest but with a view to bolster up the claim of a third person to the demised property, he would incur forfeiture of his tenancy rights. In *Venkatachariar's* case (3), SADASIVA AIYAR, J., after referring to several decided cases, formulated his own view thus:

> "If a tenant honestly doubtful and not intending to identify himself with a third party who sets up a title in himself against the real landlord, merely puts his alleged derivative landlord to the proof of the latter's title before the tenant could recognise him as such, such conduct may not work a forfeiture of the tenancy and may not constitute such a disclaimer of the title of the landlord as would work a forfeiture."

It was found by the learned Judge in that case that the tenant's denial of the transferee's title to the demised property was deliberate and malicious in that their only object was to support a rival claimant to the property. It is not necessary to deal in detail with other cases on the point. [See *Mathewson* v. *Jado Mahto* (4), and *Rukmini Vithu* v. *Rayaji Dattatraya Pai* (5)]

(1) 12 C.W.N. 825. (2) A.I.R. 1928 Cal. 312.
(3) A.I.R. 1919 Mad. 266. (4) 12 C.W.N. 825.
(5) A.I.R. 1924 Bom., 454.

In the light of principles elucidated above, we shall now examine the written statement of the appellant in suit no. 191 of 1946. It may be recalled that the respondent had instituted that suit in the court of the Judge of Small Causes at Kanpur for recovery of arrears of rent from the appellant. In that suit the appellant had filed the said written statement In the first part of the written statement the appellant has made a general denial of the allegations contained in the plaint of that suit. The second part of the written statement consists of additional pleadings. In the second part he has taken some specific pleas. The second part consists of paragraphs 5 to 12. In paragraph 5 he has alleged that he was not the lessee of the plaintiff respondent and that there was no agreement of lease between them. We think that this is bare statement of a true fact. It cannot be disputed that there was no direct agreement of lease between the appellant and the plaintiff respondent. Then in paragraph 6 he has alleged that he took the house on rent from Srimati Janki Kuer, who expired in June 1946. That is also bare statement of a true fact. Indeed it shows that he was admitting the title of his original lessor, Srimati Janki Kuer. In paragraph 7 he has alleged that after the death of Srimati Janki Kuer, one Srimati Vidya Wati, who was setting up herself as a daughter of the deceased Srimati Janki Kuer, has taken possession over the house. It may be observed that in this paragraph the appellant has not set up a title in Srimati Vidya Wati to the demised property. He has not said that she was the owner of the house. All that he has said is that she was setting up herself as a daughter of the deceased Srimati Janki Kuer. In other words, he has said that she was claiming the house as the daughter of the deceased Srimati Janki Kuer. In the light of the principles stated above, we have no doubt in our mind that he could not be penalised for making that statement in his written statement. In

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bad faith. We have seen the plaint of the first respondent in the ejectment suit; we do not find any allegation in that plaint to the effect that the appellant had made averments in his written statement in the rent suit in bad faith. Consequently there was no specific counter-allegation in the written statement of the appellant in the ejectment suit that his averments in the written statement in the rent suit were made in good faith. No issue was framed by the trial court on the question of good or bad faith. Therefore, if there is any evidence on record to prove bad faith of the appellant (which we have already stated has not at all been shown to us), that evidence cannot be seen by the court. (See *Sri Venkataramana Devaru* v. *State of Mysore* (1). We are, therefore, not bound by the finding of the first appellate court that the appellant did not *bona fide* make the allegations in his written statement in the rent suit.

To sum up, a reading of the appellant's written statement in the rent suit as a whole, after giving due allowance to linguistic flourish therein, gives us an impression that the appellant was not really denying the title of the first respondent to the house but was putting it to proof of its title to the house. At any rate, we cannot say with certainty that he was unambiguously repudiating the first respondent's title to the house and not trying to put it to the proof of its title to the house. In *Wisbech St Mary Parish Council* v. *Lilley* (2), one Mr. Donger was the tenant of a cottage belonging to Wisbech St. Mary Parish Council. He had lived in the cottage for about 40 years and had paid rent up to October 1953 at the rate of 10 *s.* yearly. Thereafter he suffered from protracted illness and became impecunious. It appears that he then purported to transfer the cottage to one Mr. Lilley and with that view he entered into an agreement for the sale of the cottage with him. One of the clauses in the agreement was that the

(1) 1958 S.C.R. 895, 905. (2) (1956) 1 A.E.L.R. 301.

vendor would sell and the purchaser would purchase the entire interest of the vendor in the cottage. It appears that long after that agreement one Mr. Farrow, the solicitor of Mr. Donger, wrote a letter to the solicitor of the Council informing that Donger had told him that he owned the cottage for more than 40 years and had never paid rent. The Council claimed that the agreement read along with the letter of Mr. Farrow proved that Donger had repudiated the title of the Council to the cottage and that he had, therefore, put an end to his interest as tenant. The claim was, however, not accepted by Court of Appeal SIR RAYMOND EVERSHED, M. R., said thus:

> ". . . . it is said by counsel that the statement in Mr. Farrow's letter . . . . proved this: that Mr. Donger at the date of the transaction was asserting that he was the absolute owner of this cottage, and that, contrary to the facts, he had never paid any rent in respect of it: so that such assertion, plus the sale to Mr. Lilley . . . . amounted to an act aimed at enabling Mr. Lilley to set up a title adverse to the Council. I was myself inclined to think during the argument, assuming these facts are true, that Mr. Donger was really deceiving Mr. Lilley by telling him (contrary to the fact) that no rent was paid, and that he was the owner, in order that he might extract £20 from Mr. Lilley . . . . It may be, as ROMER, L.J., pointed out, that Mr. Donger (who was old then and in a very ailing condition) may have regarded the slight sum of 10 *s.* a year as of no account, and may genuinely have thought that he had paid and was paying no rent in any true sense of the term. On either view, it seems to me, put at its highest, by no means clear, as an inference from these facts (assuming them all to be true), that this was a transaction aimed at enabling Mr. Lilley to set up a title adverse to the true owner."

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At page 304 of the Report SIR RAYMOND EVERSHED went on to say:

> " . . . I for my part agree with the Judge that in the end of all, when reliance is placed on a disclaimer, it is a question of fact how far, properly interpreted, the transaction ought to be treated as having gone. Put interrogatively, in the language of counsel's own formulation: Can it be said here that the Parish Council proved (and clearly proved), because they are the plaintiffs, and the onus let Mr. Lilley into possession with the intention of enabling Mr Lilley to set up an adverse title."

He concurred with the view of the Judge that the denial by the tenant of his landlord's title must be a clear denial and must be clearly proved.

We have quoted somewhat copiously from the remarks of SIR RAMOND EVERSHED to show how cases of the nature before us often turn upon a strict interpretation of the writing of the tenant (alleging to contain a disclaimer of the landlord's title) and on onus of proof. We think that the remarks of SIR RAMOND EVERSHED furnish considerable guidance on the question before us, and, examining the appellant's written statement in the rent suit in the light of those remarks, we do not feel satisfied, as already stated, that the appellant had unambiguously repudiated the first respondent's title to the house. In our opinion, his written statement is more susceptible of the construction that he was putting the first respondent to the proof of its title to the house. On that view we would hold that the first respondent has failed to discharge the onus of proving that the written statement of the appellant in the rent suit unambi-

guously disclaimed the first respondent's title to the house and that his interest as a tenant, therefore, came to an end

We accordingly hold that the appellant has not forfeited his tenancy rights and is not liable to be ejected from the house.

Appeal allowed.

APPELLATE CIVIL

1961
Mar. 24

Before Mr. Justice Mukerji and Mr. Justice Lal

VISHWAPAL SHARMA (APPELLANT)

v.

SUKH SANCHARAK COMPANY (PRIVATE) LIMITED (IN LIQ.) AND OTHERS (RESPONDENTS)

Winding up of a company—*Liability of delinquent directors, etc.—Limitation for proceedings against, Computation of,—Liability of legal representative of delinquent director—Indian Companies Act,* 1913, *ss.* 175(1) *and* (2), 235(1).

The period of "three years from the first appointment of a liquidator in the winding up . . . ." for an application by the liquidator for assessing or enforcing the liability of a director or any other officer of the company for misapplication, etc. of any money or property of the company is to be computed not from the date of the appointment of the provisional liquidator under s. 175(2) of the Act but the appointment of the liquidator under s. 175(1) following or simultaneously with the order of the winding up.

The liability aforesaid being tortious or quasi-criminal is not enforceable against the heirs or legal representatives of the delinquent director or officer.

Special Appeal no. 587 of 1959, (connected with special appeal no. 22 of 1960) from a decision of UPADHYA, J., dated 23rd October, 1959, in Company Application no 38 of 1954 in Company Case no. 7 of 1949.

The case-law discussed.

Gyanendra Kumar, for the appellant.

A Banerji, for the respondents.

The Judgment of the Court was delivered by—

MUKERJI, J.:—Special Appeal no. 587 of 1959 is by Vishwa Pal Sharma against Sukh Sancharak Company (Private) Limited (in liquidation) and others. Special Appeal no 22 of 1960 is by Smt. Subhadra Devi Sharma and her two sons, Aring Pal Sharma and Kirti Pal Sharma against the official liquidator Sukh Sancharak

Company Ltd. (in liquidation) and two others, namely, Vishwa Pal Sharma and Brijendra Pal Sharma. Special Appeal no. 29 of 1960 is by Brijendra Pal Sharma against Sukh Sancharak Co. (Private) Ltd. (in liquidation) and Vishwa Pal Sharma, Smt. Subhadra Devi, Aring Pal Sharma and Kirti Pal Sharma.

The aforementioned appeals arise out of the liquidation proceedings that commenced in respect of the private limited company known as the Sukh Sancharak Company (Private) Ltd. The various appellants in the three aforementioned appeals were members of a single family, for the company was a private limited liability company.

The company had in all 3,000 shares and these 3,000 shares were taken by the three brothers Vishwa Pal Sharma, Shakti Pal Sharma and Brijendra Pal Sharma It appears that the relations between the brothers were anything but cordial with the result that disputes arose between them. As a result of the disputes, on the 9th May, 1949, Brijendra Pal Sharma filed an application for the winding up of the private limited company bearing the name of Sukh Sancharak Co (Private) Ltd. On the filing of the application it appears a prayer for the appointment of an official liquidator was made. On the 10th May, 1949, Sri I. B Banerji was appointed provisional liquidator.

The actual winding up order was made on the 14th May, 1952, and the provisional liquidator was appointed official liquidator by an order, dated the 27th May, 1952, the official liquidator happened to be also Sri I. B. Banerji, so that for the purposes of this case the provisional liquidator became the official liquidator in the case.

An appeal was preferred against the winding up order and there was an application which, in effect,

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prayed for the stay of the winding up order and the functioning of the official liquidator, as such. By an order, dated 2nd June 1952, the operation of the winding up order was stayed, though it does not appear clear as to whether or not any specific order in regard to staying the activities of the official liquidator was made.

The appeal was dismissed on the 4th September, 1953, with the result that the interim stay order, whatever its scope and ambit was, ceased to operate and the appointment of the official liquidator came to have full legal play.

On the 17th December, 1954, the official liquidator moved an application under section 235 of the Companies Act, 1913, against Vishwa Pal Sharma, Brijendra Pal Sharma and Shakti Pal Sharma's wife Smt. Subhadra Devi and her two sons. This application the official liquidator made on the basis of an audit report, which had been made on the 6th November, 1954. The audit report appears to have come into existence as a consequence of an order by the learned Company Judge for the auditing of the accounts. Under the audit report the liability of the persons mentioned hereunder appears to have been apportioned: Vishwa Pal Sharma was shown as liable for a sum of Rs.93,591-5-1, while Shakti Pal Sharma's widow and sons were found liable for Rs.52,315-2-11 and Brijendra Pal Sharma for Rs.66,793-5-4. The question of liability appears to have come up before the learned Company Judge and all we need say in respect of this is that the liability in respect of Shakti Pal Sharma's branch was reduced from Rs.52,315-2-11 to Rs.42,524-6-2. This reduction in the liability was more on the ground of an arithmetical mistake than on any other ground.

The three appeals, which we have before us, are concerned with the liabilities aforementioned, determined in the first instance, by the auditors and thereafter affirmed by the learned Company Judge.

In regard to the extent of the liability, in case there was liability, there was no argument made except on behalf of Vishwa Pal Sharma, on whose behalf it was contended that the liability had been wrongly determined because there had not been a proper adjustment of accounts and proper credits had not been given to him for moneys to which he was entitled. We may, before turning to other questions, dispose of this contention of Vishwa Pal Sharma by shortly stating that learned counsel appearing for him was unable to place before us any material on which the contention of Vishwa Pal Sharma that he was entitled to Rs.350 as salary and 2½ per cent of the profits as commission could be legitimately held to be valid. The learned Single Judge found that there was no evidence on the record to show that Vishwa Pal Sharma did not get the salary to which he was entitled or that he did not get any commission to which he was entitled, with the result that the claim of Vishwa Pal Sharma in regard to these two matters was rejected by the learned Company Judge, and we have seen no reasons on the materials on record to take a view different from that taken by the learned Company Judge.

Vishwa Pal Sharma and Brijendra Pal Sharma made their mainstay in the appeal on the question of limitation, although the question of limitation was also raised by Smt. Subhadra Devi and her two sons in Appeal no. 22 of 1960, but in her case, she had other shots in her locker to attack the judgment of the learned Company Judge with.

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The question of limitation that arose was this:

> Under section 235 of the Indian Companies (1913) Act, proceedings against a promoter, past or present Director, Manager or liquidator, or any officer of the company, could be taken for misapplication, retainer, or any misfeasance or breach of trust, "within three years from the date of the first appointment of a liquidator in the winding up" It was conceded, we may mention here, that it is only this part of the section which applied for computing time for the purposes of limitation.

As we noticed, there were, in effect, two orders which could, relate to the two appointments of a liquidator: one, by which a provisional liquidator was appointed, namely, the order of 10th May, 1949 while there was the other order which related to the appointment of the official liquidator, namely, the order of 27th May, 1952 The question that falls for determination is whether the period of three years mentioned in section 235(1) would start from the 10th May, 1949, or the 27th May, 1952, in the instant case. The material words of the section are: "the first appointment of a liquidator in the winding up". As we pointed out, the order of winding up in this case was made on the 14th May, 1952, and the official liquidator was appointed by an order of the 27th May, 1952. The order by which a provisional liquidator was appointed was, as we pointed out, made on the 10th May, 1949.

Section 175(1) says this—

> "For the purpose of conducting the proceedings in winding up a company and performing such duties in reference thereto as the court may impose, the court, may appoint a person or persons other than the official receiver to be called an official liquidator or official liquidators".

This provision of sub-section (1) quoted above appears to be of general import. Sub-section (2) of this section, however, is not of such general import, for the sub-section is in these words:

> "The court may make such an appointment provisionally at any time after the presentation of a petition and before the making of an order for winding up, but shall, before making any such appointment, give notice to the company, unless for reasons to be recorded it thinks fit to dispense with notice".

This sub-section indicates that a provisional liquidator can come into being after the presentation of a petition but before the making of an order of winding up. From this it appears that a liquidator who is appointed after the making of the order of winding up is the liquidator in winding up. Mr. *Gyanendra Kumar* on behalf of his clients contended that by virtue of s 168 the winding up of a company would be deemed to relate back to the date of the presentation of the petition. We have no quarrel with this proposition of Mr. *Gyanendra Kumar*: we are not concerned with determining the points of time from which the winding up is to be deemed to commence, we are concerned with knowing when a liquidator "in the winding up" comes into existence. In our judgment, the words 'in the winding up' in section 235(1) must relate to a point of time subsequent to the making of the order of winding up, although it may be that the appointment order is contained in the same order by which winding up is made. The first appointment of a liquidator referred to in section 235(1) cannot, in our judgment, refer to the appointment of the provisional liquidator made under sub-section (2) of section 175. Apart from the reasons which we have indicated above, there are other good reasons for coming to this conclusion.

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If we were to hold that the first appointment referred to in section 235(1) could refer to the appointment of a provisional liquidator then we would be faced with the difficulty that although the provisional liquidator could not probe into the financial position of the company to see whether there was misfeasance, breach of trust, etc. and yet limitation for taking such action would commence to run; and it may be that in certain cases, limitation would have run out before the provisional liquidator gave room to the official liquidator and before a probe into the state of affairs of the company could be made This could never have been intended.

In our opinion there should be further support for the view which we have taken from the provisions of section 177-B. The statement which the official liquidator was enabled to make under that section could be only after a winding up order had been made. For reasons given earlier we have not the slightest hesitation in holding that the period of three years mentioned in section 235(1) of the Indian Companies (1913) Act commences from the date when the official liquidator is first appointed, after the winding up order has been made. The learned Single Judge took the same view and we are of opinion that he was right. Therefore the petition which the official liquidator made under section 235 was within time.

As we pointed out in respect of Appeals no. 587 of 1959 and 29 of 1960, no other point needed determination except the small point raised by Vishwa Pal Sharma about which we have already disposed off earlier.

Coming now to Special Appeal no. 22 of 1960 filed by Smt. Subhadra Devi and her two sons, the first thing that we need say first, is that her contention in regard to limitation must fail on the same ground on which it failed in regard to the other two appeals.

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In this appeal the substantial question that the appellants raised was in regard to their liability to be proceeded against for misapplication, retaining or misfeasance, etc., as provided for under section 235(1). Against Smt. Subhadra Devi, the contention that was raised was that she was liable for the sums of money which her late husband Shakti Pal Sharma had taken away from the company in the capacity of a Director—sums to which he was not legally entitled. As against Smt Subhadra Devi, there was further this case that she in her personal capacity had made certain withdrawals for which she was answerable The question that arises in the forefront on the second part of the claim, which was put forward by the official liquidator against Smt. Subhadra Devi and her sons, was what was the capacity in which she purported to take away the moneys. It was contended by the liquidator that she purported to take away the money as a Director; indeed, his case was that she was a Director. The finding of the learned Company Judge is that Smt Subhadra Devi was not a Director, for she had never been elected as such. Further, there is nothing in the decision of the learned Single Judge or on the record to which our attention could be drawn, on which it can be said that when Smt. Subhadra Devi took any of the sums of money for which she is being made liable, she acted as a Director or as any of the persons mentioned in s. 235(1) who could be proceeded against under that section. It appears that the company which was a private company was looked upon as a family affair, and that Smt. Subhadra Devi may have in the capacity of a member of the family, as a widow of the deceased brother, who contributed to atleast one-third of the assets, took away certain sums of money. Smt. Subhadra Devi may have acted illegally or without any justification, but that

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alone did not confer jurisdiction on the official liquidator to proceed against her under the provisions of section 235(1).

Smt. Subhadra Devi and her sons could not possibly be made responsible for moneys, which had been wrongfully taken by her husband, for s. 235 does not embrace within its ambit the heirs or the legal representatives of the persons mentioned in that section who could be proceeded against under that section. The liability which is enforced under section 235 is a liability in the nature of a tort or a quasi criminal responsibility, and it is a well known proposition of law that no one could be held vicariously responsible for the tort of another unless that other had specifically authorised the tort nor can there be vicarious responsibility for a crime or a quasi crime. In our opinion, therefore, neither Smt. Subhadra Devi nor her sons could be made responsible for proceedings under section 235(1), for any thing which her husband did as a Director or in any other capacity for which he could be held responsible under section 235, nor could Smt. Subhadra Devi be held responsible for any moneys which she took away herself or through her sons in those proceedings.

The question whether Smt. Subhadra Devi could be liable as a contributory is another question. Our attention has not been drawn to any list of contributories which might have been drawn up. Therefore, we cannot say whether Smt. Subhadra Devi could be or was on any such list. This decision of ours will therefore not affect any right that the official liquidator may have to proceed against Smt. Subhadra Devi and her sons as a contributory, but she and her sons cannot be proceeded against under section 235(1), under which they had been proceeded against and out of which the present appeal has arisen.

In the result, we must allow Appeal no. 22 of 1960, and we do so Smt. Subhadra Devi and her sons will be entitled to their costs of the appeal.

Special Appeals no. 587 of 1959 and 29 of 1960 will, for the reasons given above, be dismissed, and these appeals are hereby dismissed. The official liquidator will have his costs from the appellants of these two appeals.

Appeal dismissed.

APPELLATE CRIMINAL

Before Mr. Justice Oak and Mr. Justice Gupta

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Confession in the course of investigation—*Record of, by Magistrate of the second class not specially empowered in this behalf by the State Government—Whether admissible in evidence—Code of Criminal Procedure,* 1898, *ss* 164, 530, 533 *and* 537—*Indian Evidence Act,* 1872, *s* 26

Precedents—Judgments of Privy Council—Binding force of, on High Court—Constitution of India, 1950, *Art.* 225.

The accused while in a judicial lock-up in charge of an Assistant Public Prosecutor and guarded by police head constables were alleged to have made a confession which was recorded by a Magistrate purporting to act under s 164 of the Code of Criminal Procedure, of the second class without being specially empowered in that behalf by the State Government

Held, that s. 164 of the Code of Criminal Procedure did not empower such a Magistrate to record the confession and the same was, therefore, inadmissible in evidence. The defect being one of substance and not simply of form and going to the root of jurisdiction was not curable under s 533 or 537 of the Code. The accused being, for all practical purposes, in police custody, the confession could not be treated or received in evidence as extra judicial confession made to an ordinary person. The confession could not be admissible under s. 26 of the Evidence Act either since the latter part of that section simply removes the bar against the admissibility of confession during police custody but is silent as to how it is to be recorded which is provided for and governed by s 164 of the Code Proceeding on the analogy of the principle laid down under s 530 of the Code the whole proceeding before the Magistrate in this case would be void.

Nazir Ahmad v. *King Emperor* (1) applied.

Held, further, that Article 225 of the Constitution provides that the law administered in existing High Court unless altered by the appropiate authority shall be the same as immediately before the commencement of the Constitution. The law laid down by the Judicial Committee of the Privy Council save in so far as it conflicts with any ruling of the Supreme Court would, therefore, be binding on the High Courts in India.

(1) A.I.R. 1936 P.C. 253.

Criminal Appeal no. 2017 of 1960 (Connected with Criminal Appeal no. 2109 of 1960, and Government Appeal no. 247 of 1961) from an order of F. H. Shah, Additional Sessions Judge of Bijnor, dated the 31st October, 1960.

The facts appear in the judgment.

P. C. Chaturvedi, for the appellant.

Government Advocate for the respondent

The Judgment of the Court was delivered by—

OAK, J.:—These three connected appeals relate to the murder of one Raja Ram. Singhara Singh has been convicted by the learned Additional Sessions Judge, Bijnor, under section 302, I.P.C. Bir Singh and Tega Singh have been convicted under section 302, I.P.C. read with sections 120-B, 109 and 114, I.P.C. Singhara Singh and Bir Singh have been sentenced to death; while Tega Singh has been sentenced to imprisonment for life.

According to the prosecution, Raja Ram deceased was a businessman of Afzalgarh in district Bijnor. He had a shop in the main market of Afzalgarh. For a long time Abdul Rashid accused had enmity with Raja Ram. Zamir and Khalil accused are related to Abdul Rashid accused. These men decided to get Raja Ram murdered. The three men secured the services of four Sikhs for murdering Raja Ram. The four Sikhs are Kundan Singh, Singhara Singh, Bir Singh and Tega Singh. The seven men entered into a criminal conspiracy to murder Raja Ram.

One evening Raja Ram was sitting at his shop. The four Sikh accused visited the shop at about 7-30 p.m. Three accused stood near the shop; while the fourth accused stood at a short distance from the shop. The three Sikh accused made some purchases from Raja Ram deceased. One of the Sikhs asked Raja Ram to supply certain other things. Raja Ram replied that

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he would attend to him after the price for things already purchased had been paid up by his companion. On receiving this reply, the accused who has purchased certain articles retorted that he would settle his account forthwith. So saying, that accused pulled out his pistol, and fired towards Raja Ram. The pistol, however, misfired. Another accused received a signal from his companions. That accused also pulled out his pistol, and fired at Raja Ram. That accused was Singhara Singh. Raja Ram was hit in the neck, collapsed, and died instantaneously. Some neighbours heard the report of the fire, and saw the Sikh accused running away from Raja Ram's shop. These people chased the four Sikh accused for some distance. But another fire was made by the miscreants. So the chase had to be abandoned. One Chandra Prakash handed over a written report at police station Afzalgarh the same evening.

Abdul Rashid, Zamir and Khalil accused absconded. They could not be arrested till several months had elapsed after Raja Ram's murder. The four Sikh accused were arrested upon suspicion. They were put up for identification in jail. Three accused, Singhara Singh, Bir Singh and Tega Singh made confessions before a Magistrate admitting having participated in Raja Ram's murder. The seven accused were committed to sessions for criminal conspiracy and murder.

All the seven accused pleaded not guilty. Abdul Rashid accused denied that he had enmity with Raja Ram deceased. The Sikh accused said that they were shown to witnesses before the identification parades. Singhara Singh, Bir Singh and Tega Singh denied having made confessions before a Magistrate.

The learned Additional Sessions Judge held that no offence had been established against four accused, Abdul Rashid, Zamir, Khalil and Kundan Singh.

These four accused were, therefore, acquitted. It was held that the charge of murder was proved against three accused, Singhara Singh, Bir Singh and Tega Singh. It was found that Singhara Singh was personally responsible for Raja Ram's murder. These three accused were, therefore, convicted and sentenced as mentioned above.

Criminal Appeal no. 2017 of 1960 has been filed by Singhara Singh and Bir Singh. Criminal Appeal no. 2109 of 1960 has been filed by Tega Singh. Government Appeal no. 247 of 1961 is directed against the acquittal of Kundan Singh, Abdul Rashid, Zamir and Khalil. The learned Sessions Judge has referred the case to this Court for confirmation of death sentences awarded to Singhara Singh and Bir Singh.

Raja Ram was murdered in Afzalgarh Town at about 7-30 p.m. on 20th March 1959. Chandra Prakash lodged the first information report (Ex. Ka-10) the same evening at 8 p.m. The report was made promptly. It was noted in the report that, names of the culprits were not known. But they could be identified. The report made mention about enmity between Raja Ram and Rashid accused. The prosecution has produced a number of residents of Afzalgarh, who were present near the scene of murder. There is ample evidence to prove that Raja Ram was murdered at his shop at about 7-30 p.m. on 20th March 1959.

Post-mortem examination was held next day. The deceased had several gunshot wounds. Death was due to shock and haemorrhage resulting from gunshot wounds on the lower jaw.

According to the prosecution, enmity between Abdul Rashid accused and Raja Ram deceased was the motive for murder. Chandra Prakash (P. W. 5) stated about enmity between Raja Ram deceased and Abdul Rashid accused. Two months before Raja Ram's murder

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there was a quarrel between Abdul Rashid and Raja Ram over Ram Leela ground. Abdul Rashid had fixed some pegs on this land. Raja Ram objected, and forbade Abdul Rashid to fix pegs there on the ground that that land was meant for religious purposes. Raja Ram uprooted the pegs, which had been fixed there by Abdul Rashid accused. Nishi Kant (P. W. 7) also gave evidence on the question of enmity. Initially, he described his residence as Dehra Dun. Then he said that he is a resident of Afzalgarh Town. He mentioned several quarrels between Raja Ram and Abdul Rashid. The witness was cross-examined by the defence at some length. At this stage, the State Counsel requested for permission to put some more questions by way of supplementary examination-in-chief. In this supplementary examination-in-chief Nishi Kant added that, one month before Raja Ram's murder Sardar Mahendra Singh had told Raja Ram about Rashid's offer to Mahendra Singh for murdering Raja Ram for a reward of Rs.600. This point was mentioned by Nishi Kant witness to the C.I.D. Inspector for the first time. The C.I.D. Inspector did not take up investigation until 9th May 1959. It means that Nishi Kant was silent over this matter for more than one month after Raja Ram's murder. There was a dispute between Nishi Kant witness and Rashid accused about a certain Baithak. Nishi Kant cannot, therefore, be said to be an independent witness. As observed by the learned Sessions Judge, Nishi Kant claims to be omnipresent. He claims to be present whenever Raja Ram and Abdul Rashid happened to quarrel. Nishi Kant's evidence is not reliable.

Sri Radhey Lal (P. W. 38) was Chairman, Town Area Committee, Afzalgarh. He is at present President of Afzalgarh Congress Committee. He said that one and a half months before Raja Ram's murder the witness

attended a meeting in connection with Bhoodan movement. In that meeting Raja Ram deceased mentioned that, Rashid used to threaten Raja Ram. It is true that Sri Radhey Lal is a man of status But, as pointed out by the learned Sessions Judge, there was no occasion for Raja Ram deceased mentioning about Rashid's threats in a meeting convened in connection with Bhoodan movement. Sri Radhey Lal's statement also appears suspicious.

Ex. Ka-12 is a copy of a report, dated 13th January 1959, filed by Raja Ram deceased. The report was primarily against one Ahmad Hasan. It was mentioned in that report that, Ahmad Hasan had been threatening Raja Ram through Rashid butcher. Ex. Ka-55 is a copy of a report made by the police. The report mentioned quarrels between Abdul Rashid and Raja Ram on account of various matters The report (Ex. Ka-55) concluded thus—

> "Nothing else has happened. nor is there any immediate apprehension of breach of peace. The report is submitted."

Ex. Ka-53 is a copy of another report lodged by Raja Ram with the police on 15th February 1959. In the report Ex. Ka-53, Raja Ram complained that he had suspicion against four persons including Abdul Rashid. Raja Ram thought that these persons might get any offence committed against Raja Ram. Ex. Kha-2 is a copy of a report dated 13th January 1959 lodged by Abdul Rashid against certain persons including Raja Ram. It will be noticed that, in January, 1959 Abdul Rashid accused and Raja Ram deceased made reports to the police against each other. Raja Ram was murdered in March 1959. There is, therefore, reason for believing that, for some time before Raja Ram's murder, relations between him and Abdul Rashid accused were strained.

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Mahendra Singh (P.W. 25) was produced in order to show that, Abdul Rashid accused was making plans to get Raja Ram murdered. Mahendra Singh deposed that Rashid accused proposed to him that, the witness should murder Raja Ram for a reward of Rs.600. The witness said that he was on intimate terms with Rashid accused. The witness went on to state that, he passed on the information to Raja Ram deceased. Mahendra Singh said that he had great friendship with Rashid accused. The witness had just an acquaintance with Raja Ram. In view of the relations of the witness with the parties, there was no good reason why the witness should have disclosed to Raja Ram the proposal made to the witness by his friend Abdul Rashid. Mahendra Singh said that he had never murdered anyone. Nor did he ever attempt to kill any one. He never assaulted any one with a sword, spear or *barchhi*. He is not a man of bad character It is not understood why Abdul Rashid should have looked to Mahendra Singh for murdering Raja Ram. The important information in Mahendra Singh's possession was not disclosed to the police for a long time after Raja Ram's murder. The witness was examined by the C. I. D. Inspector two months after the murder. Mahendra Singh's testimony was rightly rejected by the learned Sessions Judge.

There is also evidence to the effect that there was a conspiracy among the seven accused a couple of hours before Raja Ram's murder. Udairaj Singh (P. W. 4) and Jagdish Prasad (P. W. 8) deposed that their flour mill lies in front of Abdul Rashid's hut The two witnesses noticed Zamir, Rashid and Khalil sitting at Abdul Rashid's hut. Four Sikhs visited the hut at about 5-30 p.m. The strangers were entertained by the Muslim accused to drinks. The same evening at about 7-30 p.m. Raja Ram was murdered. The two witnes-

ses saw Sikhs running away from Raja Ram's shop. In his examination-in-chief Udairaj Singh pointed out Kundan Singh, Singhara Singh and Bir Singh accused The witness said that he saw the three accused running away from Raja Ram's shop. The witness did not state that, these very accused had been seen by the witness in the afternoon at Rashid's hut. Udairaj Singh claims to have seen the strangers at 5-30 p.m. But in his statement before the police the witness said that he saw the Sikhs at the hut at about 7 p.m. In the month of March it would be dark at 7 p.m.

One Bhajan Singh was suspected in connection with the present murder. He was put up for identification at Faridkot in East Punjab. Bhajan Singh was identified by as many as four witnesses on the footing that, he was one of the persons responsible for Raja Ram's murder. But Bhajan Singh was not prosecuted by the police ultimately. It is now said for the prosecution that, Bhajan Singh had nothing to do with Raja Ram's murder. Udairaj Singh witness identified Bhajan Singh as one of the culprits Udairaj Singh claims to have noticed Sikhs at two stages at the hut at 5-30 p.m. and near Raja Ram's shop at 7-30 p.m. The witness did not mention to anybody that the Sikhs had been seen by him in Rashid's company at his hut. Both these witnesses, Udairaj Singh and Jagdish Pd. were employees of Banarsi Das Krishna Kumar According to the statement of Chandra Prakash (P. W. 5), there has been litigation between Krishna Kumar and Abdul Rashid since 1957. Krishna Kumar has filed a suit against Abdul Rashid accused for ejectment from certain land. In view of the litigation between Krishna Kumar and Abdul Rahid accused, Udairaj Singh and Jagdish Prasad cannot be considered to be independent witnesses. The learned Sessions Judge was prepared to believe that, the two witnesses took

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part in chasing the culprits. But the learned Judge did not think that the two witnesses visited Raja Ram's shop. Jaggu Singh (P. W. 6) is an excise contractor at Afzalgarh. He said that at 5 or 5-30 p.m. Khalil accused visited his shop and obtained a bottle of liquor. Khalil accused said that Rashid and Zamir were entertaining certain guests. Later in the evening Raja Ram was murdered. There was a dispute between Jaggu Singh witness and Rashid accused about certain land. Jaggu Singh is not an independent witness. Secondly, Jaggu Singh does not know the guests entertained by Rashid and Zamir that evening. So Jaggu Singh's statement is of little value. The mere fact that Rashid, Zamir and Khalil entertained some guests a couple of hours before Raja Ram's murder is hardly evidence about a criminal conspiracy. These witnesses do not claim to have heard any talk among these accused pointing out a criminal conspiracy for the commission of murder. The evidence of these four witnesses, Udairaj Singh, Jaggu Singh, Jagdish Prasad and Mahendra Singh is not sufficient for establishing a criminal conspiracy

The most important witness in the case is Kumari Usha (P. W. 1). She is the daughter of Raja Ram deceased. She was present at the shop, when her father was shot dead. She was, therefore, in a good position to identify the culprits. There was a gas lamp burning at the shop. She said that one of the culprits carried a *tabal*. She, however, said that *tabal* is a weapon, with which a bullet is fired. Kumari Usha was in a good position to identify the assailants.

The prosecution examined six witnesses, who chased the offenders just after the murder. The first witness of this group is Narendra Kumar (P. W. 2). He stated that he visited Raja Ram's shop for purchasing caustic soda. Harnam Singh (P. W. 3) stated that at first his

master Rajendra had sent Narendra Kumar to fetch caustic soda But as there was delay, Rajendra sent Harnam Singh also for the same purpose The learned Sessions Judge has pointed out that, there was hardly any need to send Narendra Kumar and Harnam Singh in quick succession just to get caustic soda in the evening.

The third witness of this group is Udairaj Singh (P W 4)

The fourth witness of this group is Chandra Prakash (P W. 5) It was Chandra Prakash, who lodged the first information report (Ex Ka-10). He admitted that during the entire pursuit he could not see the faces of the offenders, as none of them turned round. If Chandra Prakash had no opportunity to observe faces of the culprits, it is unlikely that, the other persons who took part in the chase had a proper opportunity to see faces of the assailants.

The fifth witness of this group is Jagdish Prasad (P. W. 8). His evidence is similar to that of Udairaj Singh (P. W. 3).

The last witness of this group is Jaswant (P. W. 10). He said that he had first visited the shop of one Ramnath. Prices quoted by Ram Nath were high. The witness, therefore, visited Raja Ram's shop in the same connection. But he did not ascertain the price at Raja Ram's shop. The witness went away on finding that, three Punjabi customers were being attended to by Raja Ram. This was hardly sufficient ground for the witness going away without ascertaining price from Raja Ram's shop. Jaswant witness pointed out Singhara Singh accused, and said that he was running with a *tabal* in his hand. According to other witnesses it was Singhara Singh accused, who was responsible for killing Raja Ram by firing a pistol. Jaswant did not

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appear before the police till he was examined by the C.I.D. Inspector. That was some six weeks after the murder. Jaswant Singh's statement appears suspicious.

The four Sikh accused were put up for identification in jail. According to a note in Ex. Ka-26, Kundan Singh accused was admitted to jail on 28th September 1959. But Narain Singh head constable (P. W. 30) stated that, there is no entry of admission of Kundan Singh accused on 28th September, 1959. The witness thought that this accused must have been admitted on some previous date Kundan Singh accused was put up for identification on 22nd October 1959. That was seven months after Raja Ram's murder. Bir Singh accused was arrested on 16th October 1959. He was put up for identification on 11th November 1959. That was nearly eight months after Raja Ram's murder. Singhara Singh was arrested on 14th October 1959. But he was not put up for identification until 3rd December 1959. That was 8½ months after Raja Ram's murder. Tega Singh was arrested on 19th October 1959. But he was not put up for identification until 2nd March, 1960 That was about a year after Raja Ram's murder It will be noticed that, Bir Singh, Singhara Singh and Tega Singh had all been arrested before 22nd October 1959 But none of them was put up for identification on 22nd October 1959, along with Kundan Singh. There is no satisfactory explanation for the delay in putting up Bir Singh, Singhara Singh and Tega Singh for identification.

Ex. Ka-26 shows that the Magistrate, who conducted the identification test, noted as many as 15 distinctive marks on Kundan Singh's body. *Chits* of paper were pasted to cover up those distinctive marks. It was difficult to identify the accused with so many paper *chits* on his face. Ex. Ka-66 is the memorandum of the identification proceeding for Bir Singh accused. The

identification test was conducted by Sri Krishna Prasad, Tahsildar (P. W. 40). It was noted in Ex. Ka-66 that, all the distinctive marks of Bir Singh were covered up by paper *chits*. The accused was mixed with ten other undertrial prisoners. There is no mention in Ex. Ka-66 whether similar paper *chits* were pasted on the faces of the other ten undertrial prisoners. The accused said before the court that, such paper *chits* were not pasted on the faces of those mixed up with him. The Tahsildar thought that paper *chits* were pasted on the faces of undertrial prisoners also. But he conceded that the point was not mentioned by him in the memorandum (Ex. Ka-66). Singhara Singh had some ten paper *chits* fixed on his face. He had a beard and long hair. It was somewhat difficult to identify him more than eight months after the date of occurrence. Eleven distinctive marks of Tega Singh were noted in Ex. Ka-23. He too appears to have had a beard in the identification test.

After their arrest these accused were kept in a judicial lock-up at Afzalgarh. The judicial lock-up is at a short distance from the Tahsil and the police station. The Assistant Public Prosecutor is in charge of the judicial lock-up. It appears that police head constables worked as guards at the judicial lock-up. It was, therefore, possible for interested police offiters to establish contacts between witnesses and the undertrial prisoners kept in the judicial lock-up. As already pointed out, there is no record about the date on which Kundan Singh accused was admitted in the judicial lock-up.

Several officers took part in investigating this case. Initially, the case was investigated by Sri Chaturvedi (P. W. 36), who was then the station officer at Afzalgarh. Later, investigation was taken up by Sri Bhikhari Singh (P. W. 37). He stated that Rashid and Zamir accused were not available till October, 1959.

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Lastly, investigation was taken over by C.I.D. Inspector, Sukhbir Singh (P. W. 39). He started investigation on 9th May 1959. In cross-examination the Inspector stated that, names of Singhara Singh, Kundan Singh, Bir Singh and Tega Singh accused came to light for the first time on 17th July 1959. It means that the police had nothing against these four Sikh accused for about 4 months after Raja Ram's murder. The Inspector took no action against these accused between 17th July 1959 and 14th October 1959.

Each of the four Sikh accused was identified by a number of witnesses. Kundan Singh was identified by 11 witnesses. Bir Singh was identified by four witnesses. Singhara Singh was identified by eight witnesses. Tega Singh was identified by three witnesses. However, the evidence of identification is open to several objections. The four accused were put up for identification more than seven months after the murder. As many as four witnesses claimed to have identified one Bhajan Singh as a culprit, although it is now said that Bhajan Singh was in no way connected with this murder. The culprits had their backs towards witnesses, while they were chasing them. In that position identification of faces was difficult. It is said that out of the three culprits, who visited Raja Ram's shop at the time of the murder, one had a beard, while the other two were clean shaven. But it appears that at the time of the identification parade all the four accused had beards. That creates another difficulty in identification. A large number of *chits* were pasted on the faces of the accused at the time of the identification tests. The arrangement for keeping undertrial prisoners in the judicial lock-up was unsatisfactory. In view of all these circumstances, one cannot place much reliance upon the evidence of identification. The learned Sessions Judge was right in holding that, none

of the four accused can be convicted merely on the basis of the evidence of identification.

Exs Ka-34, Ka-35 and Ka-36 are confessions of Singhara Singh, Bir Singh and Tega Singh accused recorded by Tahsildar-Magistrate, Sri Dixit (P. W. 24). Singhara Singh accused was arrested on 14th October 1959 He was produced before Sri Dixit on 15th October 1959 Singhara Singh's confession was recorded on 16th October 1959. Tega Singh accused was arrested on 19th October 1959. His confession was recorded on 20th October 1959. Bir Singh accused was arrested on 16th October 1959. His confession was recorded on 17th October 1959. We are a little surprised that, although the three accused were arrested several months after Raja Ram's murder, they made confessions before the Magistrate so soon after their arrests Sri Dixit made it clear that, he recorded the confessions in the judicial lock-up. Ordinarily, confessions should be recorded by Magistrates in open court. The judicial lock-up at Afzalgarh is at a short distance from the tahsil building. There was, therefore, no difficulty in recording the confessions in the Tahsildar's court-room. Kumari Usha (P. W. 1) mentioned the visit of three Punjabis to her father's shop. The report (Ex. Ka-10) also mentions the visit of three strangers to Raja Ram's shop. It is said that, one man had a pistol; the second had a *tabal;* and the third man had a *lathi.* Kumari Usha mentions only one fire. The report also mentions one gunfire at Raja Ram's shop. But according to the three confessions, all the four Sikh accused visited Raja Ram's shop at the time of the murder. It is said that, Kundan Singh and Singhara Singh accused carried one pistol each. At first Kundan Singh fired his pistol. But the weapon misfired. It was then that Singhra Singh fired his pistol, and killed

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Raja Ram. Thus we find material differences between the version given by Kumari Usha and mentioned in the report (Ex Ka-10) on one side and the version to be found in the various confessions on the other side.

The main contention of Mr. *P. C. Chaturvedi* appearing for the accused persons was that, the alleged confessions are not admissible in evidence He pointed out that, Sri Dixit was only a second class Magistrate. He purported to record the confessions under section 164, Criminal Procedure Code. Section 164, Criminal Procedure Code runs thus—

> "(1) Any Presidency Magistrate, any Magistrate of the first class and any Magistrate of the second class specially empowered in this behalf by the State Government may, ... record any statement or confession made to him in the course of an investigation under this Chapter . . . ".

Sri Dixit could record the confession under section 164, Criminal Procedure Code only if he was specially empowered by the State Government in this behalf. In his deposition Sri Dixit maintained that, he was so empowered. But he could not refer to the relevant Government notification. The District Government Counsel conceded before the trial court that, the prosecution was unable to prove that, Sri Dixit was specially empowered by the State Government under section 164, Criminal Procedure Code. The learned Deputy Government Advocate also could not refer to any Government notification, by which Sri Dixit was specially empowered. We, therefore, take it that, Sri Dixit was not specially empowered by the State Government for recording confessions under section 164, Criminal Procedure Code during October 1959.

Mr. *P. C. Chaturvedi* strongly relied upon *Nazir Ahmad* v. *King Emperor* (1). In that case the prosecution sought to prove that the accused had made a confession before a first class Magistrate, Mr Vashisht. Mr. Vashisht did not record any confession, as laid down in section 164 Criminal Procedure Code. However, Mr. Vashisht appeared in the witness-box in order to prove the alleged confession He went on to state that, some rough notes of the confession were prepared on the spot The rough notes were subsequently destroyed. He, however, prepared a memorandum containing the substance but not all the matter to which the accused had referred The sole question for consideration before their Lordships was whether the evidence tendered by Mr. Vashisht on the question of the confession was admissible. After referring to the language of sections 164 and 364, Criminal Procedure Code their Lordships held that,—

> "Where a power is given to do a certain thing in a certain way the thing must be done in that way or not at all. Other methods of performance are necessarily forbidden"

Mr. Vashisht's evidence was, therefore excluded

In that case it was urged for the Crown that, although the confession could not be admitted under section 164, Criminal Procedure Code, Mr. Vashisht's oral statement was admissible, because it had nothing to do with section 164, Criminal Procedure Code. This contention was repelled by their Lordships. They observed on pages 257 and 258:

> "On the matter of construction sections 164 and 364 must be looked at and construed together, and it would be an unnatural construction to hold that any other procedure was permitted than that which is laid down with such minute particularily in the

(1) A I R 1936 P C. 253.

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sections themselves. Upon the construction adopted by the Crown the only effect of section 164 is to allow evidence to be put in a form in which it can prove itself under sections 74 and 80, Evidence Act. Their Lordships are satisfied that the scope and extent of the section is far other than this, and that it is a section conferring powers on Magistrates and delimiting them. It is also to be observed that, if the construction contended for by the Crown be correct, all the precautions and safeguards laid down by sections 164 and 364 would be of such trifling value as to be almost idle Any Magistrate of any rank could depose to a confession made by an accused so long as it was not induced by a threat or promise, without affirmatively satisfying himself that it was made voluntarily and without showing or reading to the accused any version of what he was supposed to have said or asking for the confession to be vouched by any signature. The range of magisterial confessions would be so enlarged by this process that the provisions of section 164 would almost inevitably be widely disregarded in the same manner as they were disregarded in the present case . . . In their Lordships' view it would be particularly unfortunate if Magistrates were asked at all generally to act rather as police officers than as judicial persons; to be by reason of their position freed from the disability that attaches to police officers under section 162 of the Code; and to be at the same time freeds, notwithstanding their position as Magistrates, from any obligation to make records under section 164. In the result they would indeed be relegated to the position of ordinary citizens as witnesses and then would be required to depose to matters transacted by them in their official capacity unregulated by any statutory rules

of procedure or conduct whatever . . . . . the effect of the statute is clearly to prescribe the mode in which confessions are to be dealt with by Magistrates when made during an investigation, and to render inadmissible any attempt to deal with them in the method proposed in the present case."

The learned Deputy Government Advocare relied on section 533, Criminal Procedure Code. Section 533, Criminal Procedure Code states:

"(1) If any court, before which a confession or other statement of an accused person recorded or purporting to be recorded under section 164 or section 364 is tendered or has been received in evidence, finds that any of the provisions of either of such sections have not been complied with by the Magistrate recording the statement, it shall take evidence that such person duly made the statement recorded; and, notwithstanding anything contained in the Indian Evidence Act, 1872, section 91, such statement shall be admitted if the error has not injured the accused as to his defence on the merits."

In *Emperor* v. *Kommoju Brahman* (1) it was pointed out at page 169 that, under section 533, Criminal Procedure Code a defect of form can be removed, but not a defect of substance. In the present case we have seen that Sri Dixit was not competent to record any confession under section 164, Criminal Procedure Code. In other words, he had no jurisdiction to act under that section. That is a matter of substance, and not merely one of form. Section 533 Criminal Procedure Code contemplates a case, where an accused person duly made a statement or a confession before a Magistrate. The word 'duly' means in accordance with law or a contemplated by law. If Sri Dixit was not competent

(1) A.I.R. 1940 Pat. 163.

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to record a confession under section 164, Criminal Procedure Code, it cannot be said that an accused duly made a confession, before Sri Dixit. Such a basic defect cannot be cured by section 533, Criminal Procedure Code.

A reference was also made to section 537, Criminal Procedure Code. That section lays down that, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed on appeal or revision on account of certain irregularities. That section is applicable only in those cases, where the impugned order has been passed by a court of competent jurisdiction. If a court acts without jurisdiction, section 537, Criminal Procedure Code has no application. Section 530, Criminal Procedure Code lays down that, if any Magistrate, not being empowered by law in this behalf, does certain things, his proceedings shall be void. It is true that confessions have not been expressly mentioned under section 530, Criminal Procedure Code. But if the principle of section 530 is applied; it would mean that the proceedings before Sri Dixit were void.

The learned counsel for both the parties relied upon section 26, Indian Evidence Act. Section 26, Indian Evidence Act states:

> "No confession made by any person whilst he is in the custody of a police officer, unless it be made in the immediate presence of a Magistrate, shall be proved as against such person."

The impugned confessions were made before a Magistrate. It was, therefore, urged for the State that, the confessions are admissible in evidence under section 26, Indian Evidence Act.

In *"Noukar Mouleding* v. *Emperor"* (1) it was pointed out that, the words of section 26, Evidence Act, are

(1) A I R. 1937 Sind. 213.

very wide, and there is nothing in that section that limits its operations to Magistrates specially empowered under section 164, Criminal Procedure Code. Section 26, Indian Evidence Act, lays down a rule that, no confession made by any person while he is in the custody of a police officer shall be proved against such person. To this rule there is an exception. That exception is provided by the presence of a Magistrate. For purposes of section 26, Indian Evidence Act, any Magistrate is good enough. But that is not the position as regards section 164, Criminal Procedure Code. The latter part of section 26, Indian Evidence Act, merely explains how the bar created by the section may be got over. That section does not lay down how a Magistrate should record a confession. That point has been dealt with in section 164, Criminal Procedure Code.

The learned Deputy Government Advocate realized the difficulty of treating the confessions as confessions recorded under section 164, Criminal Procedure Code, by a Magistrate. It was, therefore, suggested that the confessions may be treated as confessions recorded by an ordinary person. The place, where the accused of the present case were kept, has been described as a judicial lock-up. But for all practical purposes, these men were in the custody of police officers. So the situation attracts the bar created by section 26, Indian Evidence Act. In order to get over that bar, the prosecution had to prove the presence of a Magistrate. In order to get over the prohibition contained in section 26, Indian Evidence Act, the prosecution had to urge that Sri Dixit was a Magistrate. On the other hand, in order to get over the prohibition contained in section 164, Criminal Procedure Code, the prosecution suggested that Sri Dixit may be treated as an ordinary person. Such a

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position is untenable. This was the view taken by the Kerala High Court in *Abdul Samad* v. *The State* (1).

The learned Sessions Judge recognized that, Sri Dixit was not competent to record confessions under section 164, Criminal Procedure Code. But the learned Judge expressed the view that, the confession in question may be treated as extra judicial confessions. Now, one cannot overlook the fact that Sri Dixit was a second class Magistrate. He claimed before the court that he recorded the confessions by virtue of his special powers under section 164, Criminal Procedure Code. The confessions of Singhara Singh and Tega Singh accused make a pointed reference to section 164, Criminal Procedure Code. The confession of Bir Singh accused has also been recorded in the same form. It is, therefore, obvious that, Sri Dixit purported to record the confessions under section 164, Criminal Procedure Code in his capacity of a second class Magistrate. Under the circumstances, it is difficult to see how these confessions can be accepted as extra judicial confessions. We have already pointed out that, if Sri Dixit is treated as an ordinary person, the prosecution would have to face the difficulty created by section 26, Indian Evidence Act. We are, therefore, unable to treat these confessions as extra judicial confessions.

The learned Sessions Judge has relied on *Asharfi* v. *State* (2). In that case a Division Bench of this Court observed on page 159 thus:

> "Any person can conduct a test identification, but Magistrates are preferred. His identification memo is a record of the statement which the identifier expressly or impliedly made before him. . . . If the person holding the identification is a Magistrate of the first class, or one of the second class

(1) A.I.R. 1959 Ker. 46, 52 (2) A.I.R. 1961 All. 159.

specially empowered, section 164, Criminal Procedure Code applies, and his identification memo is admissible in evidence under section 80 of the Evidence Act without proof. But if other Magistrates or private persons hold it, they must be called in evidence to prove their memo."

Then again:

"Where the proceedings have been held before a Magistrate of a second class not specially empowered, or a Magistrate of a third class, the statement is one under the unwritten general law. There is a difference between the legal status of the two kinds of the statements . . . . Nevertheless the statement, irrespective of the powers of the Magistrate before whom it is made, remains a formal statement of the witness, and can be used, not only for the purpose of contradicting him under section 145 or 155 of the Evidence Act, but for corroborating him under section 157 of that Act . . . ."

In *Asharfi's* case the learned Judges were dealing with the question of identifiaction parades held by Magistrates. There was no occasion to discuss the question of confessions recorded before Magistrates.

The learned Deputy Government Advocate contended that, if the contention advanced on behalf of the accused persons were to be accepted, the Magistrate would be placed in a position inferior to that of ordinary persons. Such situations are not unknown to law. According to section 25, Indian Evidence Act, no confession made to a police officer shall be proved as against any accused. According to that provision, an ordinary person would be in a better position than a Superintendent of Police. Public policy requires that inexperienced Magistrates should not undertake the task of recording confessions. When a confession is record-

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ed by a Magistrate, there is a feeling that the confession must have been made voluntarily. But that sense of security is not fully justified, when a confession is recorded by a junior Magistrate. That may be the reason why the Legislature decided that, only experienced Magistrates should be entrusted with the responsible work of recording confessions, and inexperienced Magistrates should not be permitted to undertake that task.

In *Ram Singh* v *State* (1), it was held by a Division Bench of this court that, the provisions of sections 164 and 364, Criminal Procedure Code are to be strictly followed by Magistrates. Unless they follow the provisions of these two sections, the statements recorded by them cannot be admitted in evidence.

The learned Deputy Government Advocate distinguished the present case from *Nazir Ahmad's case* (2) referred to above. He pointed out that, in *Nazir Ahmad's* case (2) their Lordships of the Privy Council had to deal with a first class Magistrate, who had not recorded a confession as required by section 164, Criminal Procedure Code. On the other hand, in the present case we have to deal with a second class Magistrate, who purported to act under section 164, Criminal Procedure Code. It is true that, in *Nazir Ahmad's* case (2) the question of a confession recorded by a second class Magistrate did not directly come up for consideration. It may, however, be pointed out that, in considering the true scope of sections 164 and 364, Criminal Procedure Code their Lordships considered the general problem of confessions recorded by Magistrates. It may be that their Lordships' observations as regards powers of second class and third class Magistrates were *obiter*. None the less their Lordships' observations are entitled to great weight.

(1) A.I.R. 1950 All. 512. (2) A.I.R. 1936 P.C. 253.

The learned Deputy Government Advocate contended that, although Privy Council decisions were binding on Indian High Courts up to 1950, those decisions are no longer binding on these courts after the commencement of the Constitution. This contention is not correct. In *Punja Bai* v. *Shamrao* (1) it was pointed out that, Article 225 of the Constitution lays down that, the law administered in any existing High Court remains the same as immediately before the commencement of the Constitution. So the law laid down by the Privy Council which does not conflict with any decisions of the Supreme Court would be binding on Indian High Courts. In *Srinivas* v. *Narayan* (2) their Lordships of the Supreme Court observed on page 387 that, a decision by the Privy Council was an authority binding on Indian Courts. They could not refuse to follow such a decision. In *Das Bank Limited* v. *Kali Kumari* (3) it was held on page 532 that, an *obiter dictum* of the Privy Council containing as it does an enunciation of principle or exposition of a rule of law, the statement would be binding on the courts in India unless and until the law is held to be different by the Supreme Court. Similarly in *Sate of Bombay* v. *Chhagan Lal* (4), it was held by a Full Bench of that court that, so long as the Supreme Court does not take a different view from the view taken by the Privy Council, the decisions of the Privy Council are binding on Indian High Courts. We are not aware of any Supreme Court decision, in which the Privy Council decision in *Nazir Ahmad's* case (5) was dissented from. On the contrary, in *Shiva Bahadur Singh* v. *State of Vindhya Pradesh* (6) their Lordships of the Supreme Court quoted *Nazir Ahmad's* case (5) with approval, on page 333. We, there-

(1) A.I.R. 1953 Nag. 293.
(2) A.I.R. 1954 S.C. 379
(3) A.I.R. 1948 Cal. 530.
(4) A.I.R. 1955 Bom. 1.
(5) A.I.R. 1936 P.C. 253.
(6) A.I.R. 1951 S.C. 332.

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fore, take it that, the Privy Council decision in *Nazir Ahmad's* case (1) is still good law.

It was emphasized in *Nazir Ahmad's* case (1) that, section 164, Criminal Procedure Code is a provision conferring powers on Magistrates and delimiting them. Section 164, Criminal Procedure Code empowers Magistrates of certain classes to record statements and confessions. By implication, Magistrates falling within the residuary classes have been prohibited from recording confessions. If a Magistrate records a confession against the implied prohibition contained in section 164, Criminal Procedure Code, such a confession would be inadmissible in evidence. We, therefore, hold that, if a second class Magistrate, who is not specially empowered under section 164, Criminal Procedure Code, purports to record a confession under section 164, Criminal Procedure Code, the confession is inadmissible in evidence. Consequently, Exs. Ka-34, Ka-35 and Ka-36 are inadmissible in evidence. These confessions cannot be used either against the persons who made them, or against the co-accused named in the confessions. These confessions cannot be used for any purpose whatsoever.

The prosecution has led evidence on the following points:

(*a*) previous enmity between Abdul Rashid accused and Raja Ram deceased;

(*b*) Abdul Rashid's attempt some two months before Raja Ram's murder to get him murdered through Mahendra Singh;

(*c*) conspiracy among the seven accused on the day of the occurrence about two hours before the murder;

(*d*) identification of the Sikh accused in jail and before the Court;

(1) A.I.R. 1936 P.C. 253.

(*e*) confessions of Singhara Singh, Bir Singh and Tega Singh; and

(*f*) the fact that Rashid and Zamir accused absconded.

Now, the prosecution evidence on the question of conspiracy is unreliable. The evidence of identification does not inspire confidence. The confessions are inadmissible in evidence. The only points, which the prosecution has been able to establish, are these: Relations between Abdul Rashid accused and Raja Ram deceased were strained for some time before Raja Ram's murder. Rashid and Zamir accused were absconding in October, 1959. This evidence is not sufficient for proving any offence against any accused. There was previous enmity between Abdul Rashid accused and Raja Ram deceased. Abdul Rashid's name was prominently mentioned in the report (Ex. Ka-10). Zamir is said to be related to Abdul Rashid accused. That may be the reason why Abdul Rashid and Zamir accused got panic stricken, and absconded. The evidence on the record is not sufficient for establishing any offence against any one among the seven accused.

In the result, Criminal Appeals no 2017 of 1960 and 2109 of 1960 are allowed. Singhara Singh, Bir Singh and Tega Singh are acquitted of the various offences, for which they were convicted by the learned Sessions Judge. These three persons shall be released immediately, unless they are required in any other case. Government Appeal no. 247 of 1961 is dismissed. The refrence is rejected.

Appeal allowed.

APPELLATE CIVIL

Before Mr. Justice Mukerji and Mr. Justice Lal.

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August, 2

MR. F. EUGSTER (APPELLANT)

v.

MRS. JUNE EUGSTER AND OTHERS (RESPONDENTS)

Code of Civil Procedure, 1908, *s* 11 *and O. II r.* 2—*Plea of res* judicata *when available—Bar under O. II, r.* 2, *nature and scope of*

In the appeal the main legal pleas raised were that the suit was barred by the principle of *res judicata* and O. II r. 2 C. P. C.

The court after considering these pleas *held*:

(i) that where the bar of r. 2 of O. II Code of Civil Procedure was pleaded one had to see what gave occasion to and was the foundation of one suit and what was the occasion and foundation of the other suit and also whether when the first suit was filed on the alleged cause of action then could that alleged cause of action enable the man to seek the remedy which he had sought by the second suit.

(ii) that in order to attract the bar of r. 2 of O. II Code of Civil Procedure what had to be determined was whether what formed the foundation of the suit and enabled the plaintiff to seek his relief could entitle the plaintiff to seek a larger relief which could include the relief which was sought by the second suit.

(iii) that in a certain sense the bar of r 2 of O. II Code of Civil Procedure was in *pari materia* with the bar created by s 11 of the Code and certain other bars which could be pleaded under the generic head of 'estoppel.'

(iv) that a bar of O. II r. 2 Code of Civil Procedure was not really a matter of substance but was one of procedure though there appeared adequate reason for sustaining such a procedural bar.

(v) that the plea of *res judicata* could only be available if it could be held that the matter in the two suits was directly and substantially in issue in both the suits or that any matter, which might and ought to have been made the ground of defence or attack in the former suit had been omitted.

Case-law discussed.

First appeal no. 248 of 1959, from a decree of N. N. Sharma, Additional Civil Judge, Moradabad, dated the 4th June, 1949.

The facts appear in the judgment.

G. Kumar, for the appellant.

S. N. Misra, for the respondents.

The Judgment of the Court was delivered by—

MUKERJI, J.:—This is an appeal by one of the defendants, namely the first defendant Fred Eugster, against a decree made by the learned Civil Judge of Moradabad making a declaration in favour of the plaintiff to the effect that the plaintiff was the owner of a sum of Rs.83,622-10-2 held by the Allahabad Bank Limited, Moradabad Branch, in the name of the first defendant, i.e., Fred Eugster, which sum had been blocked by the Reserve Bank of India.

The plaintiff of the suit, Mrs. Mary June, Eugster, was the wife of the appellant, Fred Eugster, who was the first defendant to the suit. The plaintiff and the first defendant got married sometime in the year 1936: it is admitted that they had known each other fairly well for a long time prior to their marriage.

The plaintiff had a past and that past appears to have played a very important and significant role in leading to the events which culminated in the litigations (there were two) between the husband and the wife.

Mrs. June Eugster was born, according to her, in Ireland in 1902. She married one O'Brien who, according to her evidence, was a baronet. This marriage, according to the plaintiff, took place when the plaintiff was only 13 years' old. O'Brien died the same year that he married the plaintiff. After O'Brien's death the plaintiff married one Henry Thompson of Aberdeen. Henry Thompson was a Scotch businessman having a prosperous business of architects and engineers: Henry Thompson had an Engineering House at Allahabad under the name and style of

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"Frizzoni House". Henry Thompson died in 1924 bequeathing all his wealth in India and in Scotland—and it may be mentioned here that admittedly he had a lot of wealth—to his wife. The bequest by Henry Thompson was a conditional one, the condition being that the wife would forfeit her right to the estate in the event of her re-marriage.

It appears that Mrs. Thompson (as the plaintiff was at the time) had been carrying on a liaison with one Captain Visheshwarnath Singh, an officer of the British Cavalry. She married Captain Visheshwarnath Singh soon after Thompson's death, but the marriage was kept secret for fear that if the secret leaked out the plaintiff would get disinherited and would only have a small allowance of Rs.250 a month from out of the estate of her late husband Thompson. The marriage of the plaintiff with Captain Visheshwarnath Singh became known as such secrets always leak out with the result that the plaintiff lost the estate of her late husband Thompson, and had to fall back on the monthly allowance of Rs.250, but she was fortunate enough in having a wealthy son-in-law, Sir Alic Shakespear, who appears to have voluntarily made a monthly contribution of Rs. 250.

The relationship between the plaintiff and Captain Visheswarnath Singh became strained and a suit for dissolution of marriage was filed in the Allahabad High Court in 1929. This suit was, however, dismissed but it appears that subsequently a suit for judicial separation was filed and there was a compromise in the suit, and a consent decree for judicial separation with a fixed alimony of Rs.225 per month was made: this happened on the 30th of August, 1930. In 1934 Captain Visheshwarnath Singh made an application in the Court of the District Judge, Moradabad, for a decree for dis-

solution of marriage and for damages and costs—the damages and costs were claimed against Fred Eugster, the first defendant to the suit. On the 27th of August, 1934, the then District Judge of Moradabad granted a decree for dissolution of marriage. The marriage with Fred Eugster took place after this, on the 2nd of December, 1936 The marriage of the plaintiff with Fred Eugster had an easy tenor till 1945 whereafter trouble started brewing. It appears that Fred Eugster decided to quit India and towards that end he got his wife to agree to the sale of the house named 'Bellever' at Moradabad for a sum of Rs.74,000. This sale took place on the 9th of June, 1945. It appears that Fred Eugster, who had knowledge of "gut business", having been an employee of Messrs. A. D. Meyer who did gut business in India and outside, gave up A. D. Meyer and started a gut business of his own under the name and style of "Fred Eugster Exporters" at Moradabad. This business was also sold along with the goodwill for Rs.75,000 by a sale-deed, dated the 1st of January, 1946.

After the sale of the house and the gut business it appears that the Eugsters went to Switzerland. Fred Eugster was a Swiss and it appears that the call of the mother country drew him there, while Mrs. Eugster trailed behind him. Life in Switzerland did not appear attractive to Mrs. Eugster. She longed to get back to India which clearly held her fancy more deeply and truly than it did Fred Eugster's. The Eugsters returned to India: Mrs. Eugster, apparently, with one object, while Mr. Eugster had another object in view. It is necessary here to mention that after the sale of the properties a lot of money collected in the hands of the Eugsters and consequently their bank balance at the Allahabad Bank Limited, Moradabad Branch, swelled. There was at that time more or less a sum of Rs.1,68,500 at this bank standing in the name of the first defendant.

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The first defendant made an attempt to remove all the money standing in his name outside India but under the powers vested in the Reserve Bank of India, the Reserve Bank "blocked the account" of the defendant with the result that he was unable to take away all the money. His endeavours to get all the money did not succeed. As we pointed out earlier, the Eugsters had thereafter serious differences and life together as husband and wife did not appear possible.

There were apparently quarrels in regard to the money, for it appears that the plaintiff laid claim to the entire amount which stood in the name of Fred Eugster at the Allahabad Bank, Moradabad. It appears that on the 15th November, 1949, Mrs. Eugster, the plaintiff, put her signature on a paper bearing the following:

> "I, Mrs. June Eugster, do hereby certify that if I get the Rs 75,000 of my husband Mr. Eugster's money from Allahabad Bank of Moradabad, shall have no further claim upon my husband. My said husband has authorised the Bank to transfer Rs.75,000 to my name in the said Bank."

It appears that the aforequoted "certificate" by June Eugster was signed by her on an assurance given by her husband. From Ex. 44, a letter written by the Allahabad Bank, Moradabad to Mrs. Eugster on July 14, 1951, it appears that Fred Eugster went back on an undertaking that he appears to have given of letting Mrs. Eugster take Rs.75,000 out of his bank account. The relevant portion of the letter is in these words,:

> ". . . we have since received advices from Mr. Fred Eugster on the subject, while regretting

that our H. O. did not accept his terms, he has declined to give his unconditional clear instructions and has asked us to cancel the said transfer of Rs. 75,000. On the other hand he has authorised us to pay you every month starting from 1st July a sum of Rs.500 from his account, subject to the sanction of the Reserve Bank of India. He has further asked us to renew the deposit receipt for Rs.75,000 in his own name after a sum of Rs.3,500 therefrom is transferred to his blocked current account to meet your monthly payments"

Obviously the result of the letter of the Allahabad Bank of Moradabad referred to above was that the plaintiff was unable to get the said amount of Rs.75,000. It is necessary to notice here and now that the aforequoted, so called, certificate executed by Mrs. Eugster, the plaintiff, by which she purported to give up her further claim on her husband was a conditional one, dependent upon her getting the money straightaway.

The plaintiff claimed that the entire money which stood in the name of her husband Fred Eugster was hers, ... though it could be said with some amount of fairness that she had been a bit wobbly in this matter.

In 1951 the plaintiff filed a suit in the court of the Civil Judge, Moradabad (*suit no* 81 of 1951). In that suit she claimed a declaration that she was the full and absolute owner of the sum of Rs.75,000 without any reservations attaching to it out of the blocked amount of Rs.1,63,500 which stood in the name of the first defendant at the Allahabad Bank Limited, Moradabad. That suit was decreed on the 28th March, 1952. It was admitted before us that it was only as a result of the aforementioned decree the plaintiff was able to get Rs.75,000 from the Allahabad Bank. The plaintiff, as

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we pointed out earlier, wanted all the money that was left over at the Allahabad Bank, Moradabad, and which stood in the name of the first defendant Fred Eugster, but she was unable to get it.

On the 18th December, 1952, the plaintiff filed the suit out of which the present appeal has arisen, the main relief in the suit being worded as follows:

> "It may be declared that the plaintiff is the owner of Rs 88,000 more or less, i.e., of all the money standing in the Allahabad Bank, Moradabad, in the name of defendant no. 1 and which has been blocked by the Reserve Bank of India."

To this suit the plaintiff had the Allahabad Bank Limited, Moradabad, and the Reserve Bank of India as defendants though no specific relief was claimed against them.

Fred Eugster, who was Defendant no. 1 to the suit, filed a written statement and his main plea was that the money in respect of which the plaintiff had made her claim was his and not the plaintiff's. It may here be reiterated that the plaintiff's case was that her husband Fred Eugster had not enough money either to buy the land for the house, or build the house at Moradabad, or to invest in the "gut" business and the entire money with which the properties were bought and a business started and carried on was the plaintiff's money. The defendant had only his labour and knowledge to offer in furtherance of the business. Fred Eugster made a counter assertion that the plaintiff had not the means to invest any money in the business. He claimed that the entire money invested in the business was his and that the plaintiff had no claim whatever in respect of that business which was disposed of by him of his own free will. The defendant admitted, in paragraph 13 of the additional pleas, in his written state-

ment that he had about lacs of rupees to his credit and out of this sum of 3 lacs of rupees a sum of Rs.10,930 only was allowed by the Reserve Bank of India to be transferred to Switzerland. The defendant pleaded that by virtue of the alleged certificate, the one which Mrs. June Eugster signed on the 15th of November, 1949, relinquishing, so to speak, her further claims on her husband, the plaintiff could not make any further claim on him. The defendant, by an additional written statement filed on the 10th June, 1958, raised two further pleas, one of *res judicata*, and the other of a bar of O. 2, r. 2 of the Code of Civil Procedure.

On the respective cases of the parties, which we must candidly confess were as discursive and inartistically put as could be conceivable and a large number of issues, as many as 16, were struck by the trial Judge. It is not necessary for us to quote the issues. What, however, is necessary is to set out the main points of controversy between the parties.

The most important controversy on facts was as to whether the husband or the wife was the owner of the moneys in deposit with the Allahabad Bank Limited, Moradabad Branch, and standing in the name of the defendant and in respect of which the declaration in the present suit was claimed.

Of the legal pleas raised the ones that needed attention were the following:

(*a*) Was the suit barred by the principles of *res judicata* or by O. 2, r. 2, C. P. C.? and

(*b*) Whether the suit could be said to be barred on any principle of estoppel?

A plea of limitation was also raised in the trial court but no such plea was pressed before us in appeal, although there was a ground to that effect in the grounds of appeal.

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Before we express our opinion on the controversies mentioned above, we wish to notice the findings arrived at by the learned Judge below. The court below has in effect found that the money which stood in the name of the first defendant belonged to the plaintiff. The learned Judge found that the plaintiff's suit was not barred either by *res judicata* or by O. 2, r. 2, C. P. C. or by any principle of estoppel. On the question of limitation the learned Judge was of the opinion that the suit was within time.

The first question for our consideration must be the question of fact, namely was the money in deposit with the Allahabad Bank, Moradabad, standing in the name of the defendant his or the plaintiff's.

A decision on the aforementioned question had to be arrived at on some oral testimony which was led in the case and on circumstances which had to be culled from some documents on the record and the conduct of the parties. The documentary evidence directly touching upon the question of the ownership of the money, was the record of the bank showing that the money stood in the name of Fred Eugster, the defendant. The burden of proving whether the money belonged to the defendant or the plaintiff obviously lay on the plaintiff. The burden could not be said to have been discharged by the plaintiff on the strength of her oral evidence alone nor could we say that the defendant had by his evidence established that the money was his. Fortunately there were a large number of circumstances which assisted materially in the determination of the aforementioned issue.

The history of the plaintiff's past, her status and position in life, which we have noticed in the early part of our judgment, clearly established that the plaintiff was in a position to possess a large amount of money. The life history of Fred Eugster, on the other hand, did not

make for a sound financial position. The plaintiff always had rich husbands. Of all her husbands and she had quite a few Henry Thompson was apparently the richest, for he had a very prosperous business of architects and engineers at Allahabad. On Thompson's death she had the entire estate of Thompson in her hands including liquid cash. It is true that there is no direct evidence of the fact that large sum of liquid cash came to her hands, but from what we shall say immediately hereafter would lend a good deal of assurance to our belief that she had in her hands a lot of money. It is clear on the evidence that she lived well. It is also clear that when she was in Calcutta in 1931 she had a flat on a monthly rent of Rs.200 and at that time the defendant Fred Eugster lived with her. We have the evidence of the plaintiff that she received Rs. 50,000 at least from Sir Alic Shakespear, one of her sons-in-law. It is also clear on the evidence that she received about Rs.750 a month from Frizzoni House and on the top of that she had monthly assistance from her son-in-law Sir Alic Shakespear and an alimoney from Captain Visheshwarnath Singh. So that, she was in fairly affluent circumstances. Compared to her finanacial position the defendant's was poor. The defendant started on his own showing, as an assistant in the firm of A. D. Meyer at Rs.600 per month and never got beyond Rs.1,200 per mensem. According to him, he received a bonus of Rs.5,000 a year. There is nothing on the record to substantiate either of the two assertions of the defendants , namely that since 1930 he drew a salary of Rs.1,200 a month or that he got Rs.5,000 a year as bonus. We, however have from his own evidence the fact that when his services were terminated or when he got out of A. D. Meyer's business he did not get more than Rs.2,500 from Messrs. A. D. Meyer This is clear from the answer he gave to question no. 94 of the

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interrogatories (line 36, page 40). It is clear from his own testimony that he had to borrow 800 Francs from his sister though he claims to have repaid the money. He asserted that in 1934 his capital amounted approximately to Rs.40,000. To a question set out in cross-interrogatories to the effect as to what his bank balance was at the time when the land for the building of the house at Moradabad was purchased the defendant's answer was that his capital at that time, approximately was Rs.35,000. The defendant was asked as to what the construction of the house cost. He replied that approximately it cost Rs.29,000. There is something further in the statement of the defendant which made it rather difficult for him to possess a large sum of money, even if he earned it, to his credit account in India, for he stated in answer to question no. 61 of the cross-interrogatories that he transferred every second month money to Switzerland during his 22 years' stay in India. If this was true, then he could not possibly have had a large sum of money outstanding to his credit in the bank.

Admittedly the land on which the house 'Bellever' built had been purchased by the plaintiff, for the sale-deed stood in her name and there was nothing to indicate that what was recited in the sale deed was not true. The land was purchased from one Lala Dayal on the 9th of August, 1932 for a sum of Rs.6,500 when this house was sold in June, 1945 to Margaritha Panny Meyer—Schelling for Rs.74,000 the vendors were both the husband and the wife. The sale-deed recited that the vendors had built the house named 'Bellever' and the outhouses. The mere joining of the defendant Fred Eugster in the sale-deed did not necessarily show that he had any legal right to the property, particularly when we know that there is a tendency amongst buyers of property to include in the sale-deed as vendor any

one who could at some future date make a claim to the property. Living on the premises as an apparent the master of the house, Fred Eugster, could as a legitimate precaution be added as a vendor. Therefore, the mere fact that Fred Eugster was a covendor with the plaintiff could necessarily lead to no adverse conclusions against the plaintiff.

From the admission of the defendant to which we have already referred it is clear that he could not possibly have had much money in his hands at the time when the gut business was started. Obviously, the plaintiff made an attempt through the cross-interrogatories to get the defendant to admit that he had no hand in getting the house 'Bellever' constructed at Moradabad. Towards the above end, among other questions, the following question was put:

> "Is it not a fact that when you arrived from Calcutta with the plaintiff in the evening at Moradabad you were astonished and stood at the gate (meaning of the house) saying Bellever 'A' Miracle?"

It is significant that the defendant refrained from answering this question and took refuge behind a failing memory, for he answered "I do not remember it any more."

It appears to be admitted between the parties that one Mr. Randolph constructed the house at Moradabad. It also appears that Mr. Randolph was paid for it. The defendant was asked this question: (Question no. 62 of the cross-interrogatories)—

> "Was the money spent in the construction of the house paid to Randolph by means of a cheque or otherwise?"

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The defendant replied as follows:

> "The money for the construction of the house was partly transferred from the Allahabad Bank in Calcutta to the account of Mr. Randolph with the Allahabad Bank in Moradabad and partly it was paid in cash".

The above answer of the defendant was possibly relevant to the question but it did not materially assist the defendant in giving a lie to the case set up by the plaintiff.

The circumstances, in our opinion, clearly indicated that the house at Moradabad, 'Bellever', was built from the plaintiff's money. There is one clear circumstance which, in our opinion, has almost a clinching effect on this question and that lies in the fact that when there was a quarrel between the husband and the wife over the ownership of the money the husband without much apparent demur agreed to let the plaintiff have a sum of Rs.75,000 of the moneys which stood in his name at the Allahabad Bank Limited, Moradabad Branch. In this connection we must remember that the house had been sold for Rs.75,000. The fact that the defendant subsequently tried to get out of this position should, in our opinion, make no difference to the reliability of the inference which we have drawn.

In regard to the "gut business" which was started under the name and style of 'Fred Eugster Exporters', the position was the same, namely the probabilities were that whatever money was needed for starting this business was made available to Fred Eugster by his wife, for on the circumstance which we have already noticed it could not be possible, in our opinion, for starting the gut business. In this connection there is again a very telling circumstance and that lies in the fact that the deed by which the business was sold on

the 1st of January, 1946, had been jointly executed by Fred Eugster and the plaintiff Mary June Eugster. If the plaintiff Mary June Eugster had no interest in the business then it does not appear necessary to have the plaintiff as one of the vendors, for the position in respect of the sale of a business was different from the position that obtained in respect of the sale of a house. It is interesting to note that Margaritha Fanny Meyer Schelling was the purchaser of the house and also a co-purchaser of the business. The purchasers apparently were the then owners of the firm which had, or one of the branches of which had, at one time the defendant as one of the employees.

We are, therefore, of the opinion on the evidence and circumstances appearing on that evidence that the money that was necessary for building up the gut business at Moradabad had also been advanced by the plaintiff. The defendant may have had an interest in the business, in equity in so far as he brought his labour and knowledge to run the business, but for this he has had more than compensation. He had taken out large sums from this business which he transferred to Switzerland in which no share has been claimed by the plaintiff. So that, it could not be said on the defendant's behalf that there should, "in equity" be any apportionment or that the plaintiff could not lay claim to the entire sale consideration of the business.

The question that now falls for our determination is, could the plaintiff be deprived of the decree that has been made in her favour on any of the legal grounds which we have mentioned earlier, namely on the ground of *res judicata*, bar of Or. 2, r. 2, C. P. C., or any principle of estoppel.

The plea of *res judicata* and the plea of or 2, r. 2, C. P. C. were more or less interconnected, for in order

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to sustain both the pleas reliance had to be placed on the litigation between the husband and the wife which culminated in a decree in favour of the plaintiff on March 28, 1952. Order 2 rule 2 is in these words:

"(1) Every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action; but a plaintiff may relinquish any portion of his claim in order to bring the suit within the jurisdiction of any court.

(2) Where a plaintiff omits to sue in respect of or intentionally relinquishes, any portion of his claim, he shall not afterwards sue in respect of the portion so omitted or relinquished.

(3) A person entitled to more than one relief in respect of the same cause of action may sue for all or any of such reliefs; but if he omits, except with the leave of the court, to sue for all such reliefs, he shall not afterwards sue for any relief so omitted.

EXPLANATION—For the purposes of this rule an obligation and a collateral security for its performance and successive claims arising under the same obligation shall be deemed respectively to constitute but one cause of action."

In order to determine what exactly was meant by the expression "cause of action" and what was the scope of the words "any of such reliefs" in clause (3) of the rule, the explanation which is appended to this rule supplies a fair key to its interpretation as well. In respect of the application of this rule, there are many cases in which the effect of the bar was considered. In *Muhammad Hafiz* v. *Mirza Muhammad Zakariya* (1), their Lordships of the Judicial Committee of the Privy Council had occasion to express their view in regard to the true scope of this rule. Their Lordships explained that—

(1) A.I.R. 1922 P.C. 23.

"The cause of action (expression used in this rule) related to cause of action which gives occasion to, and forms the foundation of, the suit, and if that cause enables a man to seek for larger and wider relief than that to which he limits his claim, he cannot afterwards seek to recover the balance by independent proceedings."

We may also refer to the case of *Mohammad Khalil Khan* v. *Mahbub Ali Mian* (1) wherein their Lordships of the Privy Council pointed out that the cause of action in the two suits could be considered to be the same if in substance they were identical, so that on the strength of this case, identity of the subject matter was also an important circumstance to be considered in determining whether the bar of rule 2 could arise or not.

From the above it follows clearly that where the cause of action and the remedies sought are distinct or different there could be no bar under this rule. What is important to observe is that the cause of action referred to in the rule was that which gave occasion to and forms the foundation of the suit. Therefore, where the bar of rule 2 was pleaded one had to see what gave occasion to and was the foundation of one suit and what was the occasion and foundation of the other suit. One had also to see whether when the first suit was filed on the alleged cause of action then could that alleged cause of action enable the man to seek the remedy which he had sought by the second suit. The fact that certain common allegations of facts appear in the two suits, the further fact that it became necessary, as a part of introducing the subject matter of the suit to refer to certain material facts and the fact that the recital of this so called material facts was similar in both the suits did not attract the bar of rule 2 of order 2. In

(1) A.I.R. 1949 P.C. 78.

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order to attract the bar of this rule, what had to be determined was whether what formed the foundation of of the suit and enabled the plaintiff to seek his relief could entitle the plaintiff to seek a larger relief which could include the relief which was sought by the second suit. We can usefully refer to the case of *Jokhi v. Sardar Singh* (1) wherein *Mootham*, C. J. and AGRAWALA, J., pointed out that—

> "In order that the cause of action for two suits may be the same for the application of order 2, rule 2, it is necessary that not only the facts which would entitle the plaintiff to establish his title to the property claimed in the two suits be the same but also that the attack on the title or the infringement of the plaintiff's right at the hands of the defendant must have arisen, in substance, out of the same transaction."

We emphasise the words "same transaction". We think that in a certain sense the bar of rule 2 was in *pari materia* with the bar created by section 11 of the Code and certain other bars which could be pleaded under the generic head of 'estoppel'. The courts do not easily countenance a bar against the plaintiff to deny him the relief claimed: a bar has to be strictly made out. A bar of O. 2, r. 2 was not really a matter of substance but was one of procedure though there appeared adequate reason for sustaining such a procedural bar.

Keeping in view what we have said as to the nature of the bar available under rule 2, we have got to see whether on the facts and circumstances of the case Original Suit no. 81 of 1951 provided sufficient material to enforce the bar of this rule.

Original Suit no. 81 of 1951 was filed on the 26th August, 1951. The plaintiff in the suit was Mrs. June

(1) A.I.R. 1955 All. 661.

Eugster, the same person as is the plaintiff in the suit out of which this appeal has arisen. Defendants to the suit were also the same persons as in the present suit, namely Fred Eugster, the Allahabad Bank Limited, Moradabad Branch, and the Reserve Bank of India. Quite a large number of allegations in the two suits—Suit no. 81 of 1951 (we shall hereafter call it the 1951 suit); and Suit no. 124 of 1952 (we shall hereafter call it the 1952 suit) out of which the present appeal has arisen—were common. In both the suits the plaintiff June Eugster thought it advisable to recite the entire history which culminated in 1951 in that suit and subsequently the same facts with those additional things that necessitated the 1952 suit. In the 1951 suit the declaration that was sought was this:

> "A. That it may be declared that out of the blocked account of Rs.1,68,500 or thereabout standing in the name of defendant no 1 with the Allahabad Bank Ltd., Moradabad, Defendant no. 2, the plaintiff is the full and absolute owner of Rs.75,000 without any conditions whatsoever."

In the 1952 suit the declaration that was sought was this:

> "(a) It may be declared that the plaintiff is the owner of Rs.88,000 more or less, i.e., of all the money standing in the Allahabad Bank, Moradabad, in the name of defendant no. 1 and which has been blocked by the Reserve Bank of India."

Even a cursory comparison of the two reliefs quoted above would show that there was in substance a difference in the two reliefs claimed. The difference that made its appearance in the two reliefs arose because the basis of the two suits, in substance, was different. The 1951 suit had to be filed because Fred Eugster, the

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appellant in this appeal, went back on the undertaking which he gave to the plaintiff and on the basis of which undertaking the plaintiff executed the so called 'certificate' Ex. A-4. The 1951 suit was necessitated by the fact that the plaintiff was unable to get Rs.75,000 which she had, at any rate, got out of the entire moneys that stood in the name of her husband Fred Eugster. The cause of action for the 1951 suit was in essence the alleged unlawful act of Fred Eugster in placing obstacles, contrary to the agreement, in the plaintiff obtaining the sum of Rs 75,000 from the Allahabad Bank. The cause of action for the 1952 suit was not that: the cause of action for the 1952 suit lay in, the husband, Fred Eugster laying a claim to the entire money held by the Allahabad Bank Limited, Moradabad Branch, the money which had been locked up by the Reserve Bank of India.

Their Lordships of the Privy Council, as we have noticed already in the case of *Mohammad Khalil Khan* (1), pointed out that the cause of action in the two suits could be considered to be the same if in substance they were identical. Earlier in 1922 their Lordships in *Muhammad Hafiz's* (2) case—a case which also we have already noticed—pointed out that the bar of r. 2 of Or. 2 could only apply if the cause of action which gave occasion to and formed the foundation of the earlier suit enabled the plaintiff to seek a larger or a wider relief which could include the relief which was sought by the subsequent suit. Applying this test to the facts and circumstances of the present case, we find that on the cause of action which gave rise to the 1951 suit the plaintiff could not possibly claim any larger relief than what she had claimed, for she could not claim a declaration in respect of the entire money on that cause of action, though it may be that at that date if the plaintiff

(1) A.I.R. 1940 P.C. 78. (2) A.I.R. 1922 P.C. 28.

wanted she could by differently framing her suit and alleging her cause of action differently have claimed a larger relief, but the bar of rule 2 does not arise on what the plaintiff could do in respect of her rights on a particular date: under the law she could for each cause of action file a separate suit and seek the relief that that cause of action could give her.

In *Jokhi Ram's* (1) case—a case we have already noticed—a Bench of this Court pointed out that in order that the cause of action for two suits may be the same for the application of the bar of rule 2 it was necessary that not only the facts which would entitle the plaintiff to establish his title to the property claimed in the two suits be the same but also that the attack on the title or the infringement of the plaintiff's right at the hands of the defendant must have, in substance, arisen out of the same transaction. Applying this test to the circumstances of the instant case noticed above, we could not possibly say that the infringement of the plaintiff's right had a common basis.

For the reasons indicated above we are of the opinion, therefore, that the present suit was not barred by O. 2, r. 2 of the Code of Civil Procedure.

The plea of *res judicata* could only be available if it could be held that the matter in the two suits was directly and substantially in issue in both the suits or that any matter, which might and ought to have been made the ground of defence or attack in the former suit, had been omitted. We do not find any of the necessary ingredients on which the bar of *res judicata* could be raised made out. In our judgment therefore, the suit was not barred by section 11 of the Code.

A half-hearted attempt was made by learned counsel to enforce the rule of estoppel against the plaintiff, but

(1) A.I.R. 1955 All. 661.

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we were unable to see how any rule of estoppel could render assistance to the defendant as against the plaintiff in the suit. We accordingly found no substance in this plea either.

For the reasons given above we are of the opinion that there were no merits in this appeal which must fail, and we accordingly dismiss it with costs.

Appeal dismissed.

CRIMINAL REVISION

Before Mr. Justice Uniyal and Mr. Justice Ramabhadran

1961
March 28

SRIMATI SHAKILA

v.

STATE

Suppression of Immoral Traffic in Women and Girls Act, 1956, s. 13—*If a magistrate is competent to file a complaint against a person suspected of having committed an offence under the Act*

The question referred to the Division Bench was "whether a magistrate is competent to file a complaint against a person suspected of having committed an offence under the Suppression of Immoral Traffic in Women and Girls Act of 1956

The Court after considering in detail, held—

(i) that it is not a condition precedent for the initiation of prosecution under the Suppression of Immoral Traffic in Women and Girls Act of 1956 against an offender that the information should be laid before a Magistrate by the Special Police Officer. The Act has not placed any fetters on the powers of a Magistrate to take cognizance of an offence from any source whatsoever.

(ii) that there is no warrant for the proposition that cognizance of an offence under the Act cannot be taken except upon a report submitted by a special police officer.

(iii) that s. 3 of the Act does not create any bar to the filing of a complaint by a magistrate of the 1st class against a person suspected of having committed an offence under the Act and that the court of Magistrate as defined in the Act has jurisdiction to take cognizance of an offence on such complaint.

Criminal Revision no. 1199 of 1960 from an order of S. K. Srivastava, Additional Sessions Judge of Kanpur-Etawah at Kanpur, dated the 27th May, 1960.

The facts appear in the judgment.

C. S. Saran, for the applicant.

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Assistant Government Advocate for the opposite-party.

The judgment of the Court was delivered by—

UNVAL, J.:—The question raised in this reference is "whether a magistrate is competent to file a complaint against a person suspected of having committed an offence under the Suppression of Immoral Traffic in Women and Girls Act (104 of 1956), hereinafter referred to as the Act."

The facts, briefly stated are that at about 9 p.m. on the 18th March, 1959, Sri B. N. Rai, a Magistrate of the Ist class, Kanpur, found the applicant soliciting persons by words, gestures and wilful exposure of her person, for the purpose of prostitution. He placed her under arrest and filed a complaint for her prosecution under section 8 of the Act. An objection was made by the applicant in court against her prosecution challenging the validity of the complaint on the ground that she could only have been prosecuted on a charge-sheet submitted by a 'special police officer', appointed under the Act and not on a complaint filed by the Magistrate. Her objection was over-ruled by the trial court and the Additional Sessions Judge upheld that order in revision. She then filed a revision to this Court, out of which this reference has arisen.

The learned counsel appearing for the applicant has raised two contentions before us; firstly, that a 'special police officer' appointed under the Suppression of Immoral Traffic in Women and Girls Act, can alone initiate prosecution in respect of offences mentioned thereunder, and secondly, that the Act being a self-contained enactment it was not permissible to enlarge the powers of a magistrate by reference to the provisions of the Criminal Procedure Code, hereinafter referred to as 'the Code'."

The Suppression of Immoral Traffic in Women and Girls Act is a special law which prescribes a special procedure with respect to the arrest, investigation and trial of the offences mentioned in the Act. Section 2(i) defines a 'special police officer' as meaning a police officer, appointed by or on behalf of the State Government to be *in-charge of police duties* within a specified area for the purpose of the Act. Section 13 enacts that there shall be, for each area to be specified by the State Government in this behalf, a special police officer appointed by or on behalf of that Government, for dealing with offences under this Act in that area. It is further provided that in areas outside the Presidency towns of Madras, Calcutta and Bombay, an officer of the rank of a Deputy Superintendent of Police shall be appointed as a special police officer for dealing with offences under the Act. Section 14 makes all the offences punishable under the Act to be cognizable offences. Section 15 makes provision for the search by special police officers of premises which may be suspected of being used for the purpose of prostitution. So much about the powers and functions of a 'special police officer' appointed under the Act.

Coming now to the powers which may be exercised by a Magistrate with respect to offences falling under the Act, it is provided in section 2(c) that a Magistrate specially empowered by the State Government shall exercise jurisdiction under the Act and that such Magistrate shall be a District Magistrate, a Sub-Divisional Magistrate, a Presidency Magistrate or a Magistrate of the 1st class. Under section 12(4), a Magistrate on receiving information from the police or otherwise, that any person within the local limits of his jurisdiction habitually commits, or attempts to commit, etc., any offence under this Act, may require such person to show cause why she should not be ordered

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to execute a bond for her good behaviour, etc. Section 16 indicates that where a Magistrate has reason to believe, from information received from the police or otherwise, that a girl apparently under the age of 21 years, is living, or is carrying on, or is being made to carry on prostitution in a brothel, he may direct the special police officer to remove the said girl from the brothel and produce her before him. Sub-section (2) of section 16 further provides that the special police officer, after removing the girl from the brothel, shall produce her before the Magistrate issuing the order. Section 18 gives power to a Magistrate to order eviction of the occupier of the premises, in respect of which he receives information from the police or otherwise that they are being used by prostitutes for carrying on their trade, etc. Similarly, section 20 empowers a Magistrate to issue notice to a woman or girl requiring her to appear before him and show cause why she should not be required to remove herself from any place situate within the local limits of his jurisdiction, if he receives information that the said woman or girl resides in or frequents any place within the local limits of his jurisdiction.

Thus the Legislature has defined and clearly distinguished between the respective powers and functions of a special police officer and a Magistrate specially empowered in that behalf. There does not appear to be any ambiguity as to the intention of the Legislature on this matter.

Under the Act the special officer alone is charged with the performance of police duties. He is to all intents and purposes a police officer whose powers are analogous to those of the police officer in charge of a police station in regard to the investigation of cognizable offences as contemplated by the Code.

It was urged that the Act has invested a special police officer with powers for 'dealing with offences' and that

this shows that no other person or authority is competent to initiate a prosecution for an offence made punishable thereunder. We are unable to accede to this argument. The expression 'dealing with offences' in section 18(1) refers to the police powers, conferred on a special police officer. It does not and cannot enlarge his powers. It simply means that the special police officer has been charged with the performance of police duties, within a specified area for carrying out the purpose of the Act. The Act provides a special machinery for the performance of police duties by an officer specially appointed for that purpose. To this extent, the Act makes a departure from the provisions of the Criminal Procedure Code. Consequently, it follows that the duties, which are normally required to be performed by the officer in charge of a police station shall be performed only by the special police officer, appointed under the Act.

The scheme and purpose of the Act clearly disclose that the special police officer, who has been invested with police powers may arrest an offender, carry out searches of premises used for the purpose of prostitution and file a charge-sheet in court against a person suspected of having committed an offence under the Act. At the same time, the other modes of initiating prosecution, as for example upon a complaint by a private party or upon his own knowledge or suspicion by a Magistrate, are not outside the Act. The Act is silent upon these matters and it must, therefore, be held that the provisions of the Criminal Procedure Code would be applicable in regard to matters for which there is no specific provision in the Act. The above conclusion finds support by reference to sub-section (2) of section 5 of the Code which states that all offences under any other law shall be investigated, inquired into, tried and otherwise dealt with according to the same provisions but subject to any enactment for the time being in force regulating

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Uniyal, J.

the manner or place of investigating, inquiring, trying or otherwise dealing with such offences Therefore, in so far as the Act makes provision for the offences being dealt with in a particular manner and by a particular officer or class of officers, the provisions of the Act shall override the provisions of the general law. But in matters with respect to which the Act is silent the provisions of the general law will come into operation.

The learned counsel contended that the maxim "*Expressio unius est exclusio alterius*" applied to the case and that the special police officer having been invested with the power of dealing with offences under the Act, it should be held that the Legislature had impliedly prohibited cognizance of cases in any other manner than that provided by the Act. The maxim is based upon the probable intention of the Legislatu. Hence where that intention is clear the principle of the maxim is not applicable. In Crawford's Construction of Statutes at page 336 the learned author observes—

> "The principle is to be used only as a means of ascertaining the Legislative intent where it is doubtful and not as a means of defeating the apparent intent of the Legislature. Where the statutory language is plain and the meaning clear there can be no implied exclusion."

In the present case the Legislature has clearly limited the power of the special police officer to those functions which are ordinarily performed by the police officer-in-charge of a police station. Hence it follows that the other modes of initiating prosecution, by way of complaint or otherwise have not been excluded. Consequently, it cannot be held that it was intended to exclude other methods of bringing offences to the notice of the court.

It would thus appear that the cognizance of an offence on the basis of a complaint filed by a magistrate is not prohibited by the Act. Indeed, a reading of sections 16, 18 and 20 of the Act would go to show that a magistrate may take cognizance on information received from the police or otherwise in respect of offences mentioned therein. Thus, it is not a condition precedent for the initiation of prosecution against an offender that the information should be laid before a magistrate by the special police officer. The magistrate is empowered under the Act to take cognizance of an offence on information received from any source or upon his own knowledge of the facts constituting the offence. The Act has not placed any fetter on the powers of a magistrate to take cognizance of an offence from any source whatsoever. There is, therefore, no warrant for the proposition that cognizance of an offence under the Act cannot be taken except upon a report submitted by a special police officer.

We are clearly of the opinion that section 13 does not create any bar to the filing of a complaint by a magistrate of the 1st class against a person suspected of having committed an offence under the Act and that the court of a magistrate, as defined in the Act has jurisdiction to take cognizance of an offence on such complaint.

This revision accordingly fails and is dismissed.

Revision dismissed.

CIVIL MISCELLANEOUS

Before Mr. Justice Srivastava and Mr. Justice B. Dayal

B. K. GUPTA (APPLICANT)

1961
August, 21

v.

CHANCELLOR, LUCKNOW UNIVERSITY, LUCKNOW AND OTHERS (OPPOSITE-PARTIES)

Lucknow University—*Disputes as to constitution of University authorities or bodies—Chancellor's power or order on reference—Whether judicial and to be exercised in compliance with the principles of natural justice—Lucknow University Act, 1920, s. 39—Statutes Lucknow University, St. no. 3.*

On the recommendation of the Selection Committee, the petitioner was appointed on probation for two years the Professor of Law in Lucknow University. Respondent no. 3 who had been a candidate for the said post made a representation to the Chancellor challenging the constitution of the Selection Committee and the validity of its recommendation and the resultant appointment. The Chancellor, in exercise of his power under s. 39 read with Statute no. 3 of the Lucknow University Act sent for a reply from the University and after hearing the Vice-Chancellor for the University and Respondent no. 3, held that the Selection Committee had been illegally constituted with the result that its recommendation and the appointment based thereon were null and void. The petitioner thereupon moved the High Court for, *inter alia* quashing the Chancellor's order:

Held, that the function or power under s. 39 of the Act being judicial or at least quasi-judicial and there being nothing to the contrary therein or in Statute no. 3 supplementing the same, the Chancellor was bound to conform to the principles of natural justice and since the petitioner who was directly and vitally affected thereby was not given any notice or opportunity for a hearing, the impugned order was bad in law and liable to be quashed.

The validity of the appointment itself being in question, the fact of the appointment remaining on probation or the remedy through a reference to arbitration could not be pleaded as a bar to the writ.

Case-law discussed.

Civil Miscellaneous Writ no. 1754 of 1959.

The facts appear in the judgment.

J. Swarup and *R. S. Pathak*, for the applicant.

The Advocate-General (*K. L. Misra*), Senior Standing Counsel (*Sambhu Prasad*) and *G. P. Singh*, for the opposite-parties.

The judgment of the Court was delivered by—

SRIVASTAVA, J.:—This is a petition under Article 226 of the Constitution. The material facts leading up to it are that in the University of Lucknow two persons, one designated as Professor of Law and the other as Professor of Constitutional and Administrative Law, were to be appointed. The appointment was to be made by the Executive Council of the University on the recommendation of a Selection Committee. There were four candidates for the two posts including the petitioner and the Respondent no. 3. The Selection Committee appointed for choosing the candidates and recommending them to the Executive Council met on the 18th of December, 1958, and after interviewing all the four candidates recommended to the Executive Council the petitioner for the post of Professor of Law and one Dr. V. N. Shukla for the other post. While the recommendation of the Selection Committee was being considered by the Executive Council on the 20th of December, 1958, an objection was raised that the Selection Committee which had made the recommendation was not duly constituted. The point was over-ruled by the Vice-Chancellor who was presiding at the meeting of the Executive Council. The recommendation of the Selection Committee was accordingly accepted and the Executive Council decided to appoint the petitioner as the Professor of Law. A formal letter of appointment was thereupon issued on the 22nd of December, 1958, appointing the petitioner as Professor of Law on proba-

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tion for two years. The Respondent no. 3 then submitted a petition, dated the 22nd December, 1958, to the Chancellor of the Lucknow University through the Vice-Chancellor of the University raising the question whether the Selection Committee had been duly constituted and whether the acceptance of its recommendations by the Executive Council and the resulting appointment of the petitioner as Professor of Law was valid. The question was submitted to the Chancellor for decision under section 39 of the Lucknow University Act. After hearing the respondent no. 3 and the Vice-Chancellor of the Lucknow University the Chancellor, now the Respondent no. 1, gave his decision on the 23rd of May, 1959. He held that the Selection Committee was illegally constituted, that the decision of the Executive Council accepting the recommendations of the Selection Committee and the appointments made as a consequence thereof were null and void. He directed that a new Selection Committee should be constituted. The Vice-Chancellor, the Respondent no. 2, was directed to implement the decision by taking immediate action. In pursuance of this decision the Registrar of the University informed the petitioner by letter, dated the 3rd of June, 1959, that his appointment as Professor of Law stood rescinded and that necessary action would be taken in due course to make an appointment in compliance with the decision of the Chancellor. On the 28th of July, 1959, the petitioner filed the present writ petition praying—

(1) That a writ, direction or order in the nature of *certiorari* may be issued quashing the order of the opposite-party no. 1 (Chancellor), dated the 23rd May, 1959.

(2) That a writ, direction or order in the nature of *mandamus* may be issued to opposite-party no. 2 (Vice-Chancellor), commanding him to give effect

to the resolution of the Executive Council, dated the 20th December, 1958, appointing the petitioner as Professor of Law.

(3) That a writ, direction or order in the nature of *mandamus* be issued restraining the opposite-party no. 2 (Vice-Chancellor) from giving effect to the decision of the opposite-party no. 1 (Chancellor), dated the 23rd May, 1959.

(4) That such other suitable writ, direction or order may be issued as may be deemed fit by this Hon'ble Court.

Several grounds have been put forward in support of the petition. Some of them relate to the merit of the decision of the Chancellor and try to make out that the Selection Committee in question had in fact been properly constituted. It is also urged that the decision of the Chancellor stands vitiated as he has contravened an important principle of natural justice by deciding the matter without hearing the petitioner who was directly interested in the matter. It is further contended that the Chancellor had exceeded his jurisdiction and that no valid reference having been made to him he was never legally seized of the question for the purposes of deciding it under section 39 of the Lucknow University Act.

The petition is opposed by all the three respondents. Counter-affidavits have been filed by the Vice-Chancellor himself, by the Registrar of the University and by the Respondent no. 3.

When the petition was argued before us, learned counsel for the petitioner did not consider it necessary to press all the grounds taken in the petition. The only ground he stressed was that the impugned decision was liable to be quashed because a fundamental principle of natural justice had been contravened and the petitioner had been deprived of his post without being

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heard. He urged that this ground alone was sufficient for the success of the petition. He pointed out that the proceedings before the Chancellor under section 39 of the Lucknow University Act were quasi-judicial proceedings. The petitioner was vitally interested in the question that had been raised. Without giving him an opportunity to have his say, the Chancellor was not justified in passing an order which directly affected the petitioner and deprived him of his post.

Section 39 of the Lucknow University Act under which the Respondent no. 3 made his representation to the Chancellor reads as follows:

> "If any question arises whether any person has been duly elected or appointed as, or is entitled to be a member of any authority or other body of the University or whether any decision of the University or any Authority thereof is in conformity with this Act, the statutes or the ordinances, the matter shall be referred to the Chancellor whose decision thereon shall be final."

The Selection Committee and the Executive Council are authorities for the purposes of the Act under clauses (2) and (5-A) of section 15. The statutes framed under the Act provide that the authority entitled to appoint a Professor is the Executive Council but the appointment must be made on the recommendation of a Selection Committee. It is not disputed that the question raised by the Respondent no. 3 in his representation to the Chancellor were covered by section 39. Out of the two main questions raised one related to the decision of the Executive Council appointing the petitioner as Professor of Law and the other was whether the Selection Committee had been constituted in conformity with the provisions of the Act, statutes and the ordinances framed

thereunder and was a properly constituted authority entitled to recommend the petitioner's appointment to the post. Both the question raised were, therefore, covered by section 39 and could be raised under it.

The Advocate-General appearing on behalf of the Chancellor conceded, and in our opinion rightly, that the proceedings under section 39 of the Lucknow University Act were quasi-judicial proceedings. The concession was however, not made by the learned counsel for the Respondent no. 3 and it was urged by him that whatever the Chancellor did under this section was purely administrative. He pointed out that there was no *lis* before the Chancellor and there was nothing in the section itself which required him to act judicially or quasi-judicially.

The section in the Allahabad University Act which corresponds to section 39 of the Lucknow University Act is section 42. It reads—

> "If any question arises whether any person has been duly elected or appointed as, or is entitled to be, a member of any authority or other body of the University, the matter shall be referred to the Chancellor, whose decision thereon shall be final."

Section 39 of the Lucknow University Act was also originally couched in exactly the same terms. By a subsequent amendment, however, the scope of the section was widened and the Chancellor was empowered to decide questions relating to the decisions of the University or any authority thereof also and to find out whether they were in conformity with the provisions of the Act, statutes or ordinances. The addition did not, however, change the nature of the proceedings or of the powers which the Chancellor was to exercise under the section.

In *Dr. Ishwari Prasad* v. *Registrar, University of Allahabad* (1) a question arose with reference to section

(1) A.I.R. 1955 All. 181.

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42 of the Allahabad University Act as to whether the proceedings under it were judicial or purely administrative and MOOTHAM, J. (as he then was), *held*:

> "The expressions "duly elected or appointed" and "entitled to be" clearly refer, in my opinion, to the legal rights of the person concerned under the Act and statutes, and the Advocate-General agreed that the Chancellor could not otherwise dispose of the question referred to him. In such circumstances I can entertain no doubt that the section imposes on the Chancellor the duty to act judicially in arriving at his decision."

The decision was confirmed in special appeal in *Registrar, University of Allahabad* v. *Dr. Ishwari Prasad* (1). Dealing with the point MEHROTRA, J. observed—

> "The Chancellor has not only to exercise his discretion but he has to take a decision thereon which necessarily implies that, in determining the dispute referred to him, he had to act judicially."

The Division Bench decision is binding on us and if we may say so with respect we are in entire agreement with it. The contention of the learned counsel for the Respondent no. 8 that the Chancellor acts only in his administrative capacity under section 39 does not appear to be acceptable at all. He deals under the section with the questions raised and is expected to decide those questions. His decision is to be final. The decision is to be arrived at not for his own satisfaction but is intended to settle disputes relating to the rights and titles of persons who are members of any authority or other body of the University or are persons who are affected by the decisions of the University or any authority thereof. While arriving at his decisions on these disputed questions, therefore, the Chancellor is expected to act judicially or at least quasi-judicially.

(1) A.I.R. 1956 All. 609

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It is, however, urged that even if the Chancellor was expected to act judicially or quasi-judicially while deciding the question referred to him under section 39, it should not be forgotten that he constituted only a domestic tribunal. Section 39 itself does not require that any particular procedure is to be followed by the Chancellor under its provisions. The only statute which had been framed with reference to the section is Statute no. 3, according to which the Chancellor in deciding the questions referred to him under section 39 may call for such documents or papers from the University or authority concerned as he may deem necessary. There is nothing, it is contended, either in the section or the statute requiring the Chancellor to issue notice to any one or to hear any one. The Chancellor, it is pointed out, cannot be expected to follow, while deciding the disputes referred to him, the procedure laid down for a civil suit or for a criminal trial. In some cases it is said, it will obviously not be very easy for him to know who are the persons who are interested in or are likely to be affected by in the question referred to him. A very large number of persons may be interested in some particular question. He cannot it is argued, be expected to give a hearing to all of them. The contention is that there are no rules of natural justice of universal application. The principles of natural justice which have to be followed by a particular domestic tribunal have to be determined keeping in view the nature of the tribunal, the statute under which it is formed and the circumstances in which it is expected to act. The only rule of natural justice which the Chancellor could be required to follow, therefore, was that he should act in good faith, do justice according to his rights and follow the provisions of the Act and the statutes. The decision of the Chancellor cannot it is urged, be questioned simply on the ground

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that no notice was issued to the petitioner and he was never given an opportunity to be heard.

It is true that the Chancellor was a domestic tribunal while performing his functions under section 39 of the Act. But a domestic tribunal is also bound to conform to the principles of natural justice as was laid down in *State Medical Faculty of West Bengal* v. *Kasiti Bhusan Dutt* (1)—

> "The decision of such a domestic body or a tribunal or a board particularly of a professional body can only be interfered with by the courts of law on three main principles, namely, (1) that such domestic authorities have acted under bias or in bad faith and *mala fide*, (2) that such authorities have violated the principles of natural justice in the proceedings and conclusions before it and (3) that such domestic authorities have exceeded their jurisdiction under the statutes, rules and regulations, regulating their duties and procedure."

These principles were deduced from the decisions in *Thompson* v. *New South Vales Branch of the British Medical Association* (2) and *Secretary of State* v. *Mask and Co.* (3). It cannot, therefore be said that a domestic tribunal is at liberty not to follow the principles of natural justice and that its decisions cannot be questioned even if it does not follow such principles.

Of course, as laid down by the Supreme Court in *The New Prakash Transport Co. Ltd.* v. *The New Suwarna Transport Co. Ltd.* (4) and again reiterated in *Nagendra Nath Bora* v. *Commissioner of Hills Division and Appeals, Assam* (5)—

> "The rules of natural justice vary with the varying constitutions of statutory bodies and the rules

(1) A.I.R. 1961 Cal. 31, 34.
(2) L.R. [1924] A.C. 764, 778.
(3) (1940) L.R. 67 I.A. 222 at page 236.
(4) A.I.R. 1957 S.C. 232.
(5) A.I.R. 1958 S.C. 398.

prescribed by the Act under which they function; and the question whether or not any rules of natural justice had been contravened, should be decided not under any pre-conceived notions, but in the light of the statutory rules and provisions."

The main grievance of the petitioner is that the Chancellor should not have decided the question referred to him without giving the petitioner an opportunity to be heard. It cannot be denied that the principle that no one should be condemned unheard and that no decision affecting any person should be arrived at behind his back without giving him a chance of having his say, is an elementary principle of natural justice. The maxim *"audi alteram partem"* is a well-known maxim of law. The question is whether while acting under section 39 of the Lucknow University Act the Chancellor was bound to conform to this rule. We find nothing in the section itself or in the statute framed thereunder on the basis of which it can be argued that the Chancellor could disregard this rule. The statute framed with reference to section 39 contemplates there being parties to the questions which are to be decided by the Chancellor under the section. It empowers the Chancellor to call for documents from the parties if he finds necessary. If he can call documents from the parties, there is no reason why he should not hear the parties if they want to be heard. In the present case the Chancellor actually gave a hearing to the Respondents nos. 2 and 3. He also took into consideration not only the representation made by the Respondent no. 3 but also the facts brought to his notice on behalf of the University by the Respondent no. 2. If the hearing was being given to those two parties it was in fairness necessary that a hearing should have been given to the petitioner also who was as much interested in the matter as the Respondent no. 3, if not more. In fact, he could

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claim to be interested in the question referred to the Chancellor to a greater extent because he had already been appointed to the post of Professor of Law and was holding it while the Respondent no. 3 was only a candidate for the post who had not even been recommended for the post.

We are unable to appreciate the argument that the Chancellor had any amount of difficulty in finding out whether the petitioner was a party interested in the question. No copy of the representation made by the Respondent no. 3 to the Chancellor has been produced before us. But in the circumstances it can safely be presumed that it had been mentioned in that representation that the Selection Committee whose constitution was being challenged had recommended the petitioner and that accepting that recommendation the Executive Council had appointed the petitioner as Professor of Law. No person could in the circumstances have any difficulty in finding out that the petitioner was a person vitally interested in the question which the Chancellor had to decide and the decision of the Chancellor was going to affect the petitioner directly. For effectively dealing with the question referred to the Chancellor, therefore, in our opinion, it was not only fair but necessary that the petitioner should have been heard. In not giving the petitioner an opportunity to have his say and giving a decision which affected him so adversely that it deprived him of a post to which he had been appointed the Chancellor clearly violated one of the fundamental principles of natural justice.

It may be that in certain circumstances in connection with some of the questions which may be referred to the Chancellor for decision under section 39 he may not find it easy to find out all the persons interested whom he should hear or the number of such persons may be large. The difficulties are, however, in no way insur-

mountable. Moreover, no amount of anticipated difficulties can, in our opinion, entitle a judicial or a quasi-judicial body to ignore any of those fundamental rules which form the foundation of its judicial character and get for it the respect and confidence of the persons whose affairs are dealt with by that body. Who are the persons interested in a particular question naturally depend on the question itself, the circumstances in which it arises and the extent of the effect of its decision. Before taking up the question referred to him the Chancellor is expected to realize its implications and to ascertain who are the persons whose rights and interests are likely to be affected by it. If the number of such persons is large that should not matter. An opportunity should be given to every one to have his say and all persons who want to be heard should be given a hearing. Only then can the decision of the Chancellor be held to be fair and just.

We may refer in this connection to a decision of the Andhra Pradesh High Court in *Cherukuri Pitchaiah v. Andhra University, Waltair, by its Registrar* (1). In that case the election of a member of the Senate of the Andhra University was in question and a reference had been made to the Chancellor under section 27 of the Andhra University Act which provided—

> "Save as otherwise provided, if any question arises whether a person has been duly elected or nominated as or is entitled to be a member of any authority of the University, the question shall be referred to the Chancellor whose decision thereon shall be final."

The unsuccessful candidate at the election had referred the question to the Chancellor who had decided it without giving a chance of hearing to the successful candi-

(1) 1961 Andhra Law Times Reports 571.

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date. The successful candidate, therefore, challenged the decision of the Chancellor by a writ petition and urged that the decision was liable to be quashed because it infringed a rule of natural justice. A writ of *certiorari* was issued and it was observed—

> "It is of the essence of justice and equity that a person should not be deprived of his property or the right of privilege without being given an opportunity to show cause against it. The Chancellor, though not a Judge in the real sense of the term but constituted only an administrative authority, exercise quasi-judicial functions in deciding whether a person was duly elected or not. Therefore, he should observe the judicial process. Even an administrative authority, when he acts in a quasi-judicial capacity, has to conform to the norms of judicial procedure It is thus meet that in the name of substantial justice, a person to be affected by the decision should be enabled to know the case he has to meet and place his views. The maxim "*audi alteram partem*" means that no person should be condemned without being heard. In other words, any person to be affected must be afforded an opportunity to know the case he has to meet and to put his view point before the authority deciding the dispute."

It was next urged that when the point of the unconstitutionality of the Selection Committee was raised before the Executive Council at the time it was considering the recommendations of the Committee, the Vice-Chancellor was of opinion that the Selection Committee had been duly constituted.

He, therefore, over-ruled the objection raised. That was the stand taken by the Vice-Chancellor on behalf of the University even in reply to the representation made by the Respondent no. 3 to the Chancellor. At the

time of the hearing of the representation the Vice-Chancellor Sri Iyer said all that could be said against the representation of the Respondent no. 3. So even if the petitioner had been heard he could not have added anything substantial to what the Vice-Chancellor had already said. The petitioner cannot, it is urged, in the circumstances make a grievance of the fact that he was not given a hearing. The argument is wholly unimpressive. Neither the Lucknow University nor the Vice-Chancellor represented the petitioner or held any brief for him. As the petitioner was the person who was going to be principally affected by the decision of the Chancellor he was entitled in his own right to be given a hearing. The fact that the stand that was taken by the Lucknow University at that stage was similar to that of the petitioner appears to be entirely immaterial. If there are more defendants than one in a suit having similar defences any of them cannot be shut out and be put out of Court simply on the ground that the other defendant is raising the same pleas. Presumably, the University or the Vice-Chancellor were not interested either in the petitioner or the Respondent no. 3. For them it was immaterial whether the petitioner got the post or the Respondent no. 3 was appointed to it. To the petitioner the question was of personal importance and involved his future life and career. Neither the University nor the Vice-Chancellor could, therefore, be expected to put the matter before the Chancellor with the vehemence and persuasion which the petitioner would have utilized. Moreover, there could be points relating to the question not put forward by the University or the Vice-Chancellor which the petitioner could urge if he was given a chance.

On behalf of the Respondent no. 3 it was urged that in his petition the petitioner wants the decision of the Chancellor to be quashed by a writ of *certiorari*. The

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real question decided by the Chancellor was whether the Selection Committee was duly constituted. The petitioner was not directly interested in that question. He cannot, therefore, claim to be a person aggrieved by that decision and cannot on that account get it quashed by a writ of *certiorari*. It is pointed out that the petitioner can claim to be interested only in one of the consequences that followed from the decision of the Chancellor but that cannot give him a right to impugn the decision itself.

This raises an interesting question as to who can be considered to be an aggrieved person entitled to claim a writ of *certiorari*. JAMES, L.J., in *ex parte Sidebotham*, In re, *Sidebotham* (1) attempted a definition of a "person aggrieved" by saying—

> "But the words 'person aggrieved' do not really mean a man who is disappointed of a benefit which he might have received if some other order had been made. A 'person aggrieved' must be a man who has suffered a legal grievance, a man against whom a decision has been pronounced which has wrongfully deprived him of something or wrongfully refused him something or wrongfully affected his title to something."

In *Ex parte Official Receiver*, in re *Reed Bowen and Co.* (2) Lord ESHER, M. R., accepted the definition but qualified the word 'something' by saying that 'it must be something for which he had a right to ask'.

In *Ealing Corporation* v. *Jones* (3) Lord PARKER expressed the view that the expression 'a person aggrieved' connotes—

> "Some legal grievance, for example, a deprivation of something, an adverse effect on the title to something and so on."

(1) L.R. (1880) 14 Ch. D. 458. (2) L.R. (1887) 19 Q.B. 174.
(3) (1960) 3 W.L.R. 194.

and did not mean only—

> "A person who is disappointed or annoyed at the decision."

More recently in *Attorney-General of the Gambia* v. *N'Jie*, (1) Lord DENNING remarked with reference to the definition of JAMES, L.J.—

> "But the definition of JAMES, L.J., is not to be regarded as exhaustive. Lord ESHER, M. R., pointed out *In re Reed, Bowen & Co., Ex parte Official Receiver* (2). 'The words 'person aggrieved' are of wide import and should not be subjected to a restrictive interpretation. They do not include, of course, a mere busy body who is interfering in things which do not concern him; but they do include a person who has a genuine grievance because an order has been made which prejudicially affects his interests."

What has, therefore, to be seen is whether the petitioner is a person whose interests are affected by the decision of the Chancellor. The answer, in our opinion, must be in the affirmative. The petitioner is not only affected by the decision but is very much affected by it. In his decision the Chancellor not only held the Selection Committee as illegally constituted but also declared—

> "The recommendations made by this Selection Committee for appointment of persons to the two posts of Professorships mentioned above, and the decision of the Executive Council of the University taken at its meeting held on December 20, 1958, accepting the recommendations of the abovementioned Selection Committee, and the appointments made as a consequence thereof are, therefore, declared null and void."

(1) (1961) 2 All E.R. 504 at p. 511 (2) (1885) 19 Q.B.D. 178.

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The Chancellor thus in so many words declared the appointment of the petitioner as Professor of Law null and void. This part of his decision affected the petitioner directly and vitally. It had the effect of depriving him of a post which the petitioner claimed to be entitled to hold. We are, therefore, unable to accept the contention that the petitioner was not an aggrieved person so as to be entitled to get the decision of the Chancellor quashed by a writ of *certiorari*

"Two other contentions were raised on behalf of the Respondent no. 3. One was that the petitioner had been appointed only on probation and had, therefore, no right to the post of Professor of Law. At any time during the period of probation the University could terminate his services. As he had no right to continue in the post he could not maintain the petition. The other was that there were provisions in the Lucknow University Act and the statutes framed thereunder under which if an employee of the University had any grievance against it he could get it referred to arbitration. The proper remedy for the petitioner if he was dissatisfied with the termination of his appointment was to have the matter referred to arbitration.

These contentions too are quite untenable. The petitioner was certainly appointed on probation for two years. His services had, however, not been terminated on the ground that his work did not prove satisfactory or that the University did not consider it proper to retain him in service. His appointment has really been cancelled because it has been declared null and void by the Chancellor. When the validity of the appointment itself was being put in jeopardy the fact that the appointment was on probation for a period of two years and the period has not expired cannot be given any importance.

The grievance of the petitioner is not against the University. He is really aggrieved against the order of the Chancellor who has declared his appointment as null and void. There is, therefore, no question of his utilizing the provisions in the University Act or the Statutes relating to arbitration.

There is, therefore, considerable force in the contention of the petitioner that the decision of the Chancellor, dated the 23rd May, 1959, so far as it relates to him and his appointment as a Professor of Law is vitiated by the fact that it violated a fundamental principle of natural justice inasmuch as though it directly affected the petitioner it was given without giving him an opportunity of being heard. The decision is, therefore, liable to be quashed and the petitioner is entitled to restrain the Respondent no. 2 (Vice-Chancellor) from giving effect to it.

As a natural consequence of the decision, dated the 23rd May, 1959, being quashed the reference made to the Chancellor will become pending before him again and he will have to decide it in accordance with law, after giving the petitioner an opportunity to be heard. At the time of such fresh hearing it will be open to the petitioner to oppose the representation made by the Respondent no. 3 on merits and also to urge that the reference to the Chancellor was not properly made. We have not heard the parties on these points and express no opinion on the same.

It was, in the end, urged by the learned Advocate-General on behalf of the Chancellor that there is bound to be some time lag between the quashing of the decision of the Chancellor and the reference being disposed of again. He urged that for this intervening period either this Court should pass some order directing the *status quo ante* to continue or let the Chancellor pass

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such interim orders. We are unable to accede to this request. We do not know what the *status quo ante* is in this matter. We are not very sure whether the Chancellor has any powers under section 39 to issue interim orders or directions. The question has not been debated before us to enable us to say anything on the point. We are ourselves not in a position to issue any directions as to how the affairs are to be managed during this interim period. The only thing we can do is to leave the matter to take its ordinary natural course. The legal consequence of the order quashing the decision of the Chancellor must naturally follow and cannot, in our opinion, be suspended or prevented.

The petition in the result succeeds to this extent that the decision of the Chancellor (Respondent no. 1), dated the 23rd May, 1959, is quashed by a writ of *certiorari* and the Respondent no. 2 (Vice-Chancellor) is directed not to give effect to that decision. The Respondent no. 1 must deal with the reference made to him in accordance with law. The petitioner will have his costs in respect of the petition from the respondents.

Application partly allowed.

CIVIL MISCELLANEOUS

Before Mr. Justice Oak

BALAK AND OTHERS (APPLICANTS)

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v.

STATE AND ANOTHER (OPPOSITE-PARTIES)

Land Acquisition for the Union—*Notification by U. P. Government—Delegation of power—Validity of notification for —Land Acquisition Act,* 1894, *ss.* 3(*cc*) *and* 4—*Constitution of India,* 1950, *Art.* 258(1).

Writ petition—Multifariousness and its effect—Subsisting interest of petitioner—necessity of, Constitution of India, 1950, *Art.* 226.

Under Art. 258(1) of the Constitution, the power of delegating to a State Government any of the functions of the Union Executive vests in and is exercisable by the President. A notification by the Government of India purporting to be a delegation by the Central Government of its powers under or for the purposes of the Land Acquisition Act is, therefore, invalid and ineffective.

The notification under the aforesaid delegation issued by the U. P. Government for acquiring land for the purpose of the Union N. E. R. Headquarters Scheme is, therefore, bad in law and liable to be quashed.

A single petition challenging different notifications regarding two different and separate parcels of land in both of which all the petitioners are not interested is bad for multifariousness and unmaintainable. The counsel may however have his choice withdrawing as many of the petitioners as may be necessary to remove the defect.

The petitioner under Art. 226 of the Constitution, must, it is no doubt true, have a subsisting interest in the subject-matter of the writ. Such interest, however, is deemed to exist where the petitioner has a *prima facie* right and is litigating for the same.

State of Bombay v. *Purshottam Jog Naik* (1) and *Muhammad Raza Saheb* v. *Sadasiva Rao* (2) distinguished.

(1) 1952 S.C.R. 674. (2) A.I.R. 1956 Mad. 207.

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Civil Miscellaneous Writ no. 1504 of 1959.

The facts appear in the judgment.

S. C. Khare, for the applicants.

Lakshmi Saran for the opposite-parties.

OAK, J.:—By this petition under Article 226 of the Constitution certain Government notifications issued under the Land Acquisition Act are being challenged. The State of Uttar Pradesh issued a series of notifications to the effect that, certain land was to be acquired for construction of staff quarters in connection with the North Eastern Railway Headquarters Scheme. The first notification, dated the 2nd March, 1959, was under section 4 of the Land Acquisition Act (hereafter referred to as the Act), and related to an area of 113.78 acres. The second notification, dated the 16th April, 1959 related to the same area of 113.78 acres, and was issued under section 6 of the Act. The third notification related to a small area of 2 acres, and was issued under section 4 of the Act. There are 60 petitioners. Their claim is that they are tenants of the land covered by the said notifications, and their land is being illegally acquired by the State Government. The petitioners have, therefore, prayed for a writ of *mandamus* commanding the opposite-parties not to proceed with these land acquisition proceedings.

A counter-affidavit has been filed on behalf of the opposite-parties. They have maintained that the land acquisition proceedings are valid.

MR. *Lakshmi Saran* appearing for the State raised three preliminary objections as regards the maintainability of the writ petition. His first contention is that a single petition by 60 claimants with respect to separate Government notifications is not maintainable. There is force in this contention. In *Moinuddin v. State of U. P.* (1), it was held that, a joint petition con-

(1) A.I.R. 1960 All. 484.

taining a prayer for *mandamus* cannot be filed on behalf of several petitioners. The three impugned Government notifications cover two separate parcels of land. Two notifications relate to an area of 113.78 acres; while the third notification relates to an area of 2 acres. Again, there are as many as 60 petitioners. All of them are not interested in both the parcels of land. According to the affidavit of Dhonrahi petitioner, petitioners nos. 1 to 53 are tenants in the land with an area of 113.78 acres. Petitioners nos. 34, 37, 48, 52 and 54 to 60 are tenants of land measuring 2 acres. The petition is defective on account of multifariousness. There is, however, reason to believe that 53 petitioners are interested in challenging the acquisition proceedings relating to the area of 113.78 acres. I invited Mr. *S. C. Khare* appearing for the petitioners to exercise option. He elected to press the petition with respect to the area of 113.78 acres. I shall, therefore, confine further discussion in this case to this area of 113.78 acres.

Mr. *Lakshmi Saran's* second objection is that, the petitioners have not established a subsisting interest in the property in dispute. In Schedule no. 1 attached to the petition the petitioners have described how they are interested in different portions of the total area of 113.78 acres. According to the petition, 53 petitioners are tenants of this land. In paragraph 3 of the counter-affidavit it is stated:

> "There is a dispute between the Pipraich Sugar Mills and the petitioners nos. 19 to 53 in respect of the *sirdari* rights. It is the Pipraich Sugar Mills which is recorded as *sirdar* of the plots. No doubt the Assistant Collector, First Class, Gorakhpur, had passed an order in favour of the petitioners but there is a civil litigation pending between

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the said Mills and the petitioners in respect of these rights."

Since the Revenue Court has recognised the petitioners' claim as tenants, they are *prima facie* tenants of the land in dispute. The opposite-parties are hardly concerned with the litigation between the petitioners and the Sugar Mills. The petitioners are not required to await the result of that litigation. The petitioners have established a *prima facie* interest in the property in dispute. They are, therefore, entitled to file this writ petition.

The third objection against the maintainability of the petition is that, the authorities have already taken possession under the impugned notifications. In paragraph 7 of the counter-affidavit it has been stated that possession was taken over on the 3rd July, 1959. The writ petition was moved on the 13th July, 1959. Thus according to the counter-affidavit, the authorities took possession ten days before the writ petition was moved. This allegation has been challenged in the rejoinder affidavit. In paragraph 12 of the rejoinder affidavit it is stated that, there might be some paper transaction about delivery of possession. But the petitioners have continued to be in actual physical possession. In view of the conflicting statements in the rival affidavits, it is difficult to say whether possession at the moment is with the petitioners or with the opposite-parties. Since there is doubt about actual possession, one cannot give much weight to this preliminary objection raised on behalf of the opposite-parties. In paragraph 4 of the counter-affidavit it is stated that, petitioner no. 34 is not a tenant in the land covering 2 acres. Since the petition with respect to this area of 2 acres is being dismissed, it is unnecessary to discuss the question whether petitioner no 34 is interested in this area of 2 acres.

Now I proceed to discuss the merits of the writ petition. The main contention of Mr. S. C. *Khare* is that, the acquisition proceedings are for a Union purpose. It was not open to the State Government to initiate the acquisition proceedings. The impugned notifications mention that land is being acquired for construction of staff quarters in connection with the North-Eastern Railway Headquarters Scheme. This is a Union purpose. But it has been urged for the opposite-parties that, the State Government has authority to acquire land for the benefit of the Union.

Section 4 of the Act provides for publication of a preliminary notification. Sub-section (1) of section 4 states:

> "Whenever it appears to the appropriate Government that land in any locality is needed or is likely to be needed for any public purpose, a notification to that effect shall be published in the official *Gazette*, and the Collector shall cause public notice . . . ."

The expression "appropriate Government" has been defined in clause (*ee*) of section 3 of the Act. The expression "appropriate Government" means in relation to acquisition of land for the purposes of the Union, the Central Government, and, in relation to acquisition of land for any other purpose, the State Government. We have seen that in the instant case it is alleged that land is being acquired for a purpose of the Union. So in the present case "appropriate Government" means the Central Government. So it was the Central Government which could take action under section 4 of the Act for acquiring land. Action has, however, been taken by the State Government, and not by the Union Government.

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It has been urged for the opposite-parties that, the State Government has been empowered by the Central Government to take action under the Act whenever necessary. Reliance is placed upon a notification, dated the 29th March, 1952, issued by the Government of India. Annexure I to the counter-affidavit is a copy of that notification, dated 29th March, 1952 (hereafter referred to as 1952 notification). That notification runs thus:

> "In exercise of the powers conferred by clause (1) of Article 258 of the Constitution the Central Government hereby entrusts to the Governments of Bombay, Uttar Pradesh . . . . the functions of the Central Government under the Land Acquisition Act . . . . in relation to acquisition of land for the purposes of the Union within their respective territories."

According to this notification, the Central Government authorised the U. P. Government to initiate acquisition proceedings on behalf of the Central Government.

Mr. *S. C. Khare* contended that the 1952 notification is invalid. That notification purports to have been issued under Article 258 of the Constitution. Clause (1) of Article 258 of the Constitution is in these terms:

> "Notwithstanding anything in this Constitution, the President may, with the consent of the Government of a State, entrust either conditionally or unconditionally to that Government or to its officers functions in relation to any matter to which the executive power of the Union extends."

Under this provision the President may delegate his functions to a State Government. Mr. *Khare* pointed out that the 1952 notification purports to be an order by the Central Government. That notification does not refer to the President of India at all. Mr. *Khare,*

therefore, urged that, that is not a valid notification under Article 258(1) of the Constitution.

Mr. *Lakshmi Saran* contended that, although the 1952 notification purports to have been issued by the Central Government, it should be taken as delegation by the President. Reliance was placed upon *The State of Bombay* v. *Purushottam Jog Naik* (1). In that case the impugned notification ran thus:

> "Whereas the Government of Bombay is satisfied with respect to the person known as *J. N.* . . . . . that with a view to preventing him from acting in a manner prejudicial to the maintenance of public order it is necessary to make the following order: Now, therefore, ... the Government of Bombay is pleased to direct that the said *J. N.* be detained.
>
> By order of the Governor of Bombay
> (Sd.) V. T. D.,
> *Secretary to the Government of Bombay,*
> *Home Department.*"

The High Court of Bombay held that the order was defective, as it was not "expressed to be in the name of the Governor" within the meaning of Article 166(1) and was not accordingly protected by Article 166(2). That decision was reversed by the Supreme Court in appeal. Their Lordships held in appeal that, the order was not defective merely because it stated that the Government of Bombay was satisfied and that the Government of Bombay was pleased to direct that *J. N.* be detained. The order was really one expressed to be taken in the name of the Governor of Bombay within Article 166.

The impugned order in *Naik's* case (1) was issued under the Preventive Detention Act, 1950. According to

(1) 1959 S.C.R. 674.

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section 3 of that Act, action for detention could be taken if the State Government was satisfied as regards certain matters. The initial condition was the satisfaction of the State Government. The impugned order expressly mentioned that the Governmnt of Bombay was satisfied about the necessity of detaining *J. N.* So, in terms, that order complied with the requirement of section 3 of the Preventive Detention Act, 1950. Further, it was expressly mentioned that the impugned order was being issued under directions of the Governor of Bombay. There was, therefore, substantial compliance with Article 166 of the Constitution. In the present case the impugned notification of 1952 does not refer to the President of India at all. In *Muhammad Raza Saheb* v. *Sadasiva Rao* (1) the Government order was expressed as by order of the Government, Ministry of Local Self-Government. The order was signed by the Secretary to the Government. It was held that the order was validly issued. According to rule 37 of the District Municipalities Act, an order had to be issued by the Governor-in-Council. On the other hand, accordingly to section 49 of the Government of India Act, orders had to be expressed as made by the Government of the Province and authenticated as prescribed. The impugned order in that case was issued in the name of the Government. It was authenticated by the Secretary to Government. That appears to be in accordance with the directions issued by the Governor in that respect. So it was held that the order was properly issued.

We have to consider whether the 1952 notification can be considered to be an order by the President of India, although the notification purports to have been issued by the Central Government. Under Article 53 of the Constitution, the executive power of the Union shall be vested in the President and shall be exercised

(1) A.I.R. 1928 Mad. 997.

by him either directly or through officers subordinate to him in accordance with the Constitution. According to clause (1) of Article 77 of the Constitution, all executive action of the Government of India shall be expressed to be taken in the name of the President. Under this Article, even if action is taken by the Central Government, the relevant order ought to be issued in the name of the President. I do not find in the Constitution the converse proposition. There is no provision to the effect that, orders to be issued by the President might be issued in the name of the Central Government. We have seen that under clause (1) of Article 258 of the Constitution, it is the President who can delegate his functions to the State Government. There is nothing in the Constitution to suggest that the Central Government may act on behalf of the President for purposes of Article 258. It is true that, under Article 74 of the Constitution, the President is aided by a Council of Ministers. It was open to the Council of Ministers to advise the President for issuing an order under Article 258 of the Constitution. But ultimately the order had to be issued by the President, or in the name of the President. In the instant case the 1952 notification was issued by the Central Government, and not by the President. I agree with Mr. Khare that the notification, dated 29th March, 1952, is not a valid notification delegating powers under Article 258 of the Constitution. The 1952 notification did not empower the State Government to take action under the Act on behalf of the Union Government. In the absence of any such delegation of powers, action in the instant case ought to have been taken by the appropriate Government (the Central Government). It was not open to the State Government to issue notifications under sections 4 and 6 of the Act on behalf of the Union Government. The two notifications, dated the 2nd

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March, 1959 and the 16th April, 1959 with reference to the area of 113.78 acres are invalid. The authorities have tried to dispossess the petitioners on the strength of these notifications. The petitioners are entitled to be restored to possession, in case the authorities have already dispossessed the petitioners. Since the petition partly succeeds, the parties may be directed to bear their own costs.

The petition is partly allowed. The opposite-parties are directed not to give effect to the two notifications, dated the 2nd March, 1959 and the 16th April, 1959 issued under sections 4, 6 and 17 of the Act with respect to the area of 113.78 acres (Annexures A and B to the petition). The opposite-parties are directed to restore the petitioners nos. 1 to 53 to possession over this area of 113.78 acres, in case the petitioners have been dispossessed by this time. The petition is dismissed as regards the other area of 2 acres. Parties shall bear their own costs.

Petition partly allowed.

CIVIL REVISION

Before Mr. Justice Lal

HAPPY VALLEY TEA COMPANY AND ANOTHER (APPLICANTS)

v.

DARSHAN LAL (OPPOSITE-PARTY)

1961
August, 1.

Substitution of Legal representative of the sole plaintiff—*Application for, filed but no order of the court—Effect of the decree passed in the name of the deceased plaintiff and of the amended decree—Suit, whether may be deemed as still pending—Code of Civil Procedure (Act V of 1908), s. 152, O. XX, r. 6 and O. XXII, r. 3.*

On the death of the sole plaintiff as the *karta* of a joint Hindu family, an application for bringing on record his legal representative was duly filed but no order thereon was passed by the Court. The suit was later decree in terms of a compromise which was signed and verified by the proposed legal representative. The defect was, however, noticed during the execution proceedings and an application for the amendment of the plaint and decree was made and allowed but the amendments were not actually incorporated and this was effected through a subsequent application. In an objection to the executability of the amended decree.

Held, (i) that the original decree being in the name or favour of a dead person was a nullity and the amended decree or ancillary orders could be no better than or different from the same;

(ii) that the substitution application having been duly filed within the prescribed time, the suit could not abate and must, therefore, be deemed to be pending from the stage or date of the application for substitution and should accordingly proceed further in regular course according to law.

Darshan Lal Agarwala v. *Happy Valley Tea Company Limited* (1) relied on and *Qutub Ali* v. *Dwarka Das* (2) applied.

Civil Revision no. 1099 of 1959, from an order of M. C. AGARWAL, 1st Additional Civil Judge, Dehra Dun, dated 20th August, 1959.

(1) A.I.R. 1959 Cal. 691. (2) 1904 Weekly Notes, 44.

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The facts appear in the judgment.

K. N. Tripathi and *Sushil Kumar* for the applicants.

Jagnandan Lal, for the opposite-party.

LAL, J.:—This civil revision filed by the defendants arises out of somewhat peculiar circumstances as will be revealed by the facts given below.

Lala Sheo Prasad brought suit no. 461 of 1947 as *karta* of the joint Hindu family against the present applicants in the court of Civil Judge, Dehra Dun, for recovery of Rs.12,412-4-6. During the pendency of the suit Lala Sheo Prasad died and an application for substitution of his legal representatives was made on 1st April, 1949, praying that the name of Lala Darshan Lal be substituted in his place as *karta* of the joint Hindu family. Somehow no orders were passed on this application and the suit continued in the name of the deceased Lala Sheo Prasad. The parties entered into a compromise and filed it in Court on 11th August, 1949. This was duly verified by the parties and it may be noted that on behalf of the plaintiff Lala Darshan Lal verified it. The compromise was recorded and a decree followed granting instalments to the defendants. Some instalments were also paid in 1950 and 1951 and the total amount thus paid came to Rs.7,952.

When the mistake was detected an application for amendment of the decree and the plaint was made on behalf of Lala Darshan Lal on 3rd May, 1952. The prayer was that by some oversight his name had not been substituted in place of deceased Lala Sheo Prasad and no orders had been passed on the substitution application, dated 1st April, 1949, and so necessary amendments in the plaint and the decree may be made. Notices of this application were issued but it appears that the judgment-debtors filed no objections and ultimately an order for substitution of the name of Lala

Darshan Lal in place of Lala Sheo Prasad was made and the decree was ordered to be amended by an order, dated 2nd of August, 1952.

In spite of the order of 2nd of August, 1952, the amendment was not incorporated in the decree or plaint or register no. 3 or connected papers and the name of Lala Darshan Lal was not substituted. The decree-holder sought execution and the decree was transferred to Darjeeling under section 40, Civil Procedure Code. In that court the judgment-debtors filed an objection under section 47 mainly on the ground that the decree sought to be executed was a nullity. This objection was accepted by the learned Subordinate Judge who allowed the objections under his order, dated 1st June, 1954. The decree-holder thereafter filed an appeal in the Calcutta High Court.

After the objection was allowed at Darjeeling the decree-holder made a second application to the Civil Judge, Dehra Dun, on 13th July, 1954, for amendment of the decree. Again notices were issued to the judgment-debtors who did not put in appearance. There was another order for correction of the decree and plaint and the connected papers on 11th September, 1954. It seems that as the appeal in the Calcutta High Court was pending nothing material happened thereafter. After the decree-holder's appeal in the Calcutta High Court was dismissed on 16th December, 1957, with the following observations:

> "It may be that an application for substitution having been made in proper time, the suit would not abate and even years later the court might pass an order granting the substitution and then deal with and decree or dismiss the suit."

the decree-holder made an execution application on 9th May, 1958, praying (1) a decree be passed in favour of

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the plaintiff against the defendants in terms of the compromise, dated 11th August, 1949, after due notice to defendants and in the alternative (2) the suit may be treated as pending and be proceeded with on merits and a decree be passed in terms of the reliefs claimed. The plaintiff further prayed that as a sum of Rs.7,952 had been paid during the pendency of the suit a credit to that extent may be given and a decree be passed for the balance. A notice of this application was issued and the judgment-debtors contested it. The learned Civil Judge, Dehra Dun, in view of the observations made by the Calcutta High Court came to the conclusion that the suit should be treated to be pending from the stage Lala Sheo Prasad died and as orders for substitution had already been passed and amendment of the plaint had been ordered the case should be proceeded with. It is against this order that the present revision has been filed.

It has been contended by the learned counsel for the applicants that the learned Civil Judge had no jurisdiction to entertain the application once the decree passed in favour of the plaintiff is found to be a nullity and has also been held to be a nullity by the Calcutta High Court. His further contention is that the suit could not be treated to be pending and the plaintiff should seek his any other remedy if it is open to him.

I have heard learned counsel for the parties. The facts stated earlier will go to show that the plaintiff was never at fault and soonafter the death of Lala Sheo Prasad an application was made for substitution of Lala Darshan Lal as the legal representative and *karta* of the joint Hindu family which was represented by the deceased Lala Sheo Prasad. This application was made within about 15th days of the death of Lala Sheo Prasad. What the court should have done after this application was that after notice to the defendants or his counsel,

which was given on 1st April, an order for substitution of Lala Darshan Lal in place of Lala Sheo Prasad should have been passed. The Urdu order-sheet goes to show that the defendants' counsel was informed and 5th April was fixed for the disposal of this application, but no orders were passed and it seems that as the case was waiting disposal of an appeal dates were being fixed in the case for receiving the result of that appeal. In fact the date fixed in the case was 5th September, 1949, and it was before that date that a compromise was filed on 11th August, 1949. The court or the ministerial staff did not look into the file to find whether orders had or had not been passed for substitution and the compromise having been filed on behalf of the plaintiff by Lala Darshan Lal nobody cared to find out the order for substitution. This was apparently a mistake of the court and the plaintiff was not at fault at any stage of the suit.

There was a further mistake on the part of the officials and it was that when an order for substitution had been passed on 3rd May, 1952, the ministerial staff did not make necessary corrections or amendments in the plaint, decree, register no. 3 or other connected papers and in spite of the order the decree stood as it was. I may not be misunderstood to say that even though the decree was a nullity yet such an amendment could have been made. But when the plaintiff was vigilant and taking every steps at every stage and the mistake was committed either by the court or by its ministerial staff the amendment should have been made. The whole matter came to light or obtained prominence when the judgment-debtors filed an objection under section 47, Civil Procedure Code, in Darjeeling court and the decree-holder lost the objection not only from that court but from Calcutta High Court also.

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The questions that arise for consideration in this case are: (1) whether the decree, which was passed on the basis of the compromise without bringing the legal representative of deceased Lala Sheo Prasad on record, could be corrected by incorporating the order of amendment passed in 1952 and (2) if it cannot be done whether the suit should be treated to be pending.

So far as the first point goes, suffice it to say that the decree that was passed on the basis of the compromise in the case was a nullity because it had been passed in favour of Lala Sheo Prasad deceased. It is true that an application for substitution had been filed in the case on 1st April, 1949, about two weeks after the death of Lala Sheo Prasad, but by some mistake or omission no orders for substitution were passed. Even this mistake on the part of the court in not passing an order of substitution could not give the plaintiff a right to get such a decree amended. As the decree when passed was a nullity any order of amendment passed subsequent to the passing of the decree could not make it valid nor could it give the plaintiff a right to realise the decretal amount under such a decree. The decision of the Calcutta High Court given in this very case has discussed this point and the case is reported in *Darshan Lal Agarwalla* v. *Happy Valley Tea Company Ltd.* (1). At page 692 it has been observed that:

> "If a decree is passed without jurisdiction, a later order amending it, cannot remove that lack of jurisdiction and what was a nullity before the amendment does not become a valid thing after the amendment."

It can hardly be argued that the decree, as was passed without substitution, on the basis of the compromise

(1) A.I.R. 1958 Cal 691.

was a valid decree and consequently any amendment of such a decree was a futile attempt. In spite of the attempt made by the plaintiff in 1952 and 1954 and in spite of the order of the court for amendment of the decree and the connected papers, the decree could not be treated to be a valid one. It was in fact a decree which stood in the name of a dead person, Lala Sheo Prasad and the decree having been passed in his favour or in favour of the joint Hindu family represented by Lala Sheo Prasad deceased was an invalid decree. There was no living person present before the Court in whose favour a decree could be passed. The prayer for amendment of the decree or the prayer for its correction on the basis of an earlier order of amendment cannot, therefore, be granted to the plaintiff.

The only other question which requires consideration is whether under the circumstances of the case the case should be treated to be pending. The facts will disclose that Lala Sheo Prasad died on 14th March, 1949, and an application for substitution had been given on 1st April, 1949, but in spite of notice and in spite of there being no objection no orders were passed on it. The case was thereafter compromised and a compromise decree was passed on 11th August, 1949, without substitution of the legal representatives of the deceased plaintiff. The decree stood in the name of the deceased. This decree is a nullity and so the suit should be treated to be pending from the stage the substitution application was made. Obviously when the substitution application had been made within time for bringing the legal representatives there could be no abatement. The plaintiff had also to do nothing and whatever was to be done was to be done by the court. If the suit could not have abated after making the substitution application the proceeding which took place

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after the making of the substitution application without an order of substitution are a nullity. That means every thing done after 1st April, 1949, without substituting Lala Darshan Lal as legal representative and *kartu* of the joint Hindu family were all a nullity and so all the proceedings subsequent to the substitution application have no effect on the rights of the parties. The suit must be treated to be pending at the stage on which the application for substitution was made. In other words the suit must be treated to be pending now.

The learned counsel for the applicants has further contended that once a decree was passed and the proceedings were closed the suit should not be treated to be pending, but this argument cannot be accepted because the defendants judgment-debtors cannot have both ways. They cannot urge the decree to be a nullity and argue at the same time that the suit should not be treated to be pending even though further proceedings were inoperative. There is no direct authority on the point, but a mention may be made to the authority of *Qutub Ali* v. *Dwarka Dass*, (1) in which a Division Bench under similar circumstances but on slightly different facts expressed the view that the case should be treated to be pending. It was a case in which the sole defendant was dead on the date of the decree and a decree incapable of execution had been passed. The Bench thought that the case should be re-opened and proceedings started after bringing the legal representatives of the deceased defendant on record. Obviously the order passed by the learned Civil Judge could be the only correct order in the case. The suit must be treated to be pending from the stage, not from the date of the death of Lala Sheo Prasad, as observed by the learned Civil Judge, but from the date on which the substitution application was made, that is 1st April, 1949. The

(1) 1904 Weekly Notes, 11.

revision has, therefore, no force and fails. The revision is dismissed with costs. The stay order is vacated.

Record of the case shall be sent back to the court below as early as possible.

Revision dismissed.

APPELLATE CIVIL

Before the Honourable O. H. Mootham, Chief Justice, and Mr. Justice Uniyal.

1961
January 17.

HUKAM CHAND AND ANOTHER (APPELLANTS)

v.

STATE TRANSPORT AUTHORITY TRIBUNAL AND OTHERS (RESPONDENTS)

Principles governing conduct of judicial and quasi-judicial proceedings—*Existence of a reasonable suspicion of bias—Test applicable—Motor Vehicles Act,* 1939, *s.* 44(2)—*Effect of.*

By s. 44(2) Motor Vehicles Act ". . . No person who has any financial interest whether as proprietor, employee or otherwise in any transport undertaking shall be appointed as or continue as a member of a State or Regional Transport Authority . . . ."

Where one of the members of the Regional Transport Authority was related to a person in whose favour a stage carriage permit was granted: the State Transport Authority Tribunal cancelled the same on the ground that grant of such a permit would shake public confidence. This view having been upheld in a writ petition against the order of the State Transport Authority Tribunal, on a special appeal, *inter alia* on the ground that the legislature had impliedly excluded from consideration any disqualification from membership of a Regional Transport Authority other than the disqualification mentioned in s. 44(2).

Held, that, the general principle governing the conduct of judicial and quasi-judicial proceedings to the effect (i) that no man shall be a judge in his own cause, (ii) that justice should not only be done but manifestly and undoubtedly seem to be done and that if a member of a judicial body is in such a position that a bias must be assumed to exist against him, he ought not to take part in the decision or sit in the tribunal were equally applicable to the proceedings under the Motor Vehicles Act. The provisions of s. 44(2) of the Motor Vehicles Act do not limit the grounds on which a person may be disqualified. Ground mentioned in the abovementioned provision is in addition to those which exist under the general law. The test to be applied in such cases is the existence of a reasonable suspicion of bias, which being present in the instant case, the permit was incorrectly granted. The appeal was accordingly dismissed.

Case-law discussed

Special Appeal no. 33 of 1959, from a decision of B. R. JAMES, J., dated 5th December, 1958, in Civil Miscellaneous Writ no 3637 of 1958.

The facts appear in the judgment.

R. S. Pathak and *C. S. P. Singh*, for the appellants.

The Judgment of the Court was delivered by—

MOOTHAM, C. J.:—This is an appeal from an order of Mr. Justice JAMES, dated the 5th December, 1958, dismissing a petition under Article 226 of the Constitution.

The relevant facts are these—On the 8th June, 1957, the Regional Transport Authority, Kanpur Region, invited applications for the grant of a single permit on the Jhansi—Garotha route. In response to this invitation a number of applications were received including a joint application from the appellants who are two in number. The applications were thereafter published in the *Government gazette* and certain objections were received. The matter came before the Regional Transport Authority on the 16th/17th January, 1958, and by a resolution passed at that meeting the Regional Transport Authority sanctioned the grant of a stage carriage permit for a term of three years to the appellants who were, in their opinion, "the best claimants", and thereafter a permit was issued accordingly.

Against this order of the Regional Transport Authority three appeals were filed before the State Transport Authority Tribunal, the appellants being Respondent nos. 3, 4 and 5, namely Sri Bhagwan Das Gupta, Sri Ram Gopal Ratha and Sri Radha Mohan. On the 6th February, 1958, the State Transport Authority Tribunal passed an interim order in these appeals directing the Regional Transport Authority to give its reasons for granting a permit to the appellants, and at the same

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Mootham, C. J.

time it empowered that Authority to hear the parties again in order to be able to give its reasons in detail. The Regional Transport Authority accordingly met on the 10th April, 1958, and after hearing the parties passed the following resolution:

> "R.T.A. has heard Bhagwan Das Gupta through counsel, *Ram Gopal* in person and Messrs. Hukum Chand Sri Ram Tewari through their counsel. The reasons for refusing permits to the first two have as required by section 47(7) of Motor Vehicles Act, 1939, already been given in this Authority's Resolution no. 15(26), dated January 16/17, 1958, viz. want of any further vacancy on the route. As for the comparative merits of the three claimants after considering all facts the R.T.A. remain of the view that regard being had to the interest of the public generally Messrs. Hukum Chand Sri Ram Tewari have the best claim."

The State Transport Authority Tribunal then fixed the 25th October, 1958, for the further hearing of the appeals On the day preceding the date so fixed, namely the 24th October, 1958, the third respondent Sri Bhagwan Das Gupta filed an affidavit before the Tribunal wherein he alleged that one of the members of the Regional Transport Authority, Sri Balmukand Shashtri, was related to the second appellant before this court, Sri Ram Tewari. This was the first time that such an allegation had been made. On the following day, the 25th October, the State Transport Authority Tribunal by an order of that date dismissed the appeals of Sri Bhagwan Das Gupta and Sri Radha Mohan, but allowed that of the fourth respondent, Sri Ram Gopal Ratha. It accordingly directed that the permit which had been granted to the appellants be cancelled and that in lieu thereof a permit be granted

to Sri Ram Gopal Ratha. The reason for the decision taken by the Tribunal is stated by it in these words:

> "Messrs. Hukum Chand and Sri Ram Tewari in our opinion should not be allowed to continue to hold this permit. Sri Ram Tewari is closely related to Sri Balmukund Shashtri who happened to be a member of the R.T.A. In fact in another case, it was pointed to us that Sri Shashtri had performed the marriage ceremony of his neice with Sri Ram Tewari from his place and was, therefore, financially interested in the grant of the permit. An affidavit to the same effect has been filed before us. Sri Ram Tewari has not filed any affidavit nor he is present. Hukum Chand says that the relationship is not so near. Whatever may be the exact relationship it cannot be denied that Sri Balmukund Shashtri should not have exercised his opinion in the grant of this permit. That the discretion of R.T.A. was wrong, is also evident from the fact that it is unable to express its reasons. Grant of such permits shakes public confidence and therefore we are of the opinion that one of the three appeals should be allowed."

The appellants thereafter filed a petition in this Court under Article 226 of the Constitution in which they challenged the validity of the order of the State Transport Authority Tribunal and prayed that it be quashed by a writ of *certiorari*. That petition was dismissed by the order which is the subject of the present appeal, the learned Judge holding that the Tribunal had acted rightly in reversing the order passed by the Regional Transport Authority in favour of the appellants.

The argument before this Court has covered a fairly wide field. Sri *C. S. P. Singh* who has very ably argu-

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Authority is that he shall not have a financial interest in a transport undertaking. The Legislature having stated the disqualification in express terms, we will not be justified in travelling beyond that disqualification."

Now the general principle governing the conduct of judicial and quasi-judicial proceedings was stated by VISCOUNT CAVE L. C. in *Frome United Breweries Co. v. Bath Justices* (1) in these words:

> "My Lords, if there is one principle which forms an integral part of the English law, it is that every member of a body engaged in a judicial proceeding must be able to act judicially; and it has been held over and over again that, if a member of such a body is subject to a bias (whether financial or other) in favour of or against either party to a dispute or is in such a position that a bias must be assumed he ought not to take part in the decision or even to sit upon the tribunal. This rule has been asserted not only in case of Courts of justice and other judicial tribunals, but in the case of authorities which, though in no sense to be called Courts, have to act as Judges of the rights of others."

This general principle has been made from time to time the subject of certain statutory exceptions, but as the Supreme Court, after reviewing the English decisions, has pointed out in *Nageshwararao v State of Andhra Pradesh* (2):

> "These decisions show that in England a statutory invasion of the common law objection on the ground of bias is tolerated by decisions, but the invasion is confined strictly to the limits of the statutory exception"

(1) L.R. (1926) A.C., 586. (2) A I R 1959 S C 1376.

We find ourselves, with great respect, unable to agree with the view taken by AGARWALA, J. as to the effect of section 44(2). In our opinion the provision in that sub-section disqualifying persons having an interest in any transport undertaking is intended not as a limitation of the grounds on which a person may be disqualified under the general law but as an additional ground of disqualification: for a person who has an interest in a transport undertaking in one part of India may not be disqualified on the ground of bias under the general law from being a member of a Regional Transport Authority in some other part of India In our opinion the sub-section must be strictly construed and we do not think, with all respect to the learned Judge, that there is justification for holding that the disqualification specified in that sub-section was intended by the Legislature to be the only ground of disqualification We are of opinion therefore that a person may be disqualified from taking part in the deliberations of a Regional Transport Authority on a ground other than the ground mentioned in the sub-section.

Now it is not in dispute that Sri Bahmukund Shashtri is related to Sri Sri Ram Tewari, the second appellant, but it is urged that the existence of this relationship is insufficient to establish that real likelihood of bias which was laid down by the Court of Appeal in England in *Regina* v. *Camborne Justices* (1) as the true ground for disqualification. At most, it is said, there was a mere possibility of bias. The question as to what constitutes bias was elaborately considered by the Supreme Court in *Nageshwaravao* v *State of Andhra Pradesh* (2) In that case SUBBA RAO, J. delivering the judgment of the Court said at page 1378:

"The principles governing the "doctrine of bias" *vis-a-vis* judicial tribunals are well settled and they

(1) L.R. (1955) 1 Q.B.D. 41. (2) A.I.R. 1960 S.C. 1376.

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are (i) no man shall be a judge in his own cause; (ii) justice should not only be done but manifestly and undoubtedly seem to be done. The two maxims, yield the result that if a member of a judicial body is "subject to a bias (whether financial or other) in favour of, or against, any party to a dispute, or is in such a position that a bias must be assumed to exist, he ought not to take part in the decision or sit on the tribunal"; and that "any direct pecuniary interest, however small, in the subject matter of enquiry will disqualify a judge, and any interest, though not pecuniary, will have the same effect, if it be sufficiently substantial to create a reasonable suspicion of bias". The said principles are equally applicable to authorities, though they are not courts of justice or judicial tribunals, who have to act judicially in deciding the rights of others, i.e., authorities who are empowered to discharge quasi-judicial functions."

The test to be applied, therefore, is the existence of a reasonable suspicion of bias, and not the more rigorous test laid down in *Regina* v. *Camborne Justices* (1), a case which unfortunately appears not to have been brought to the notice of the Supreme Court in *Nageshwararao's* case (2). Applying this test we consider that Sri Balmukund Shastri was disqualified from participating in the decision of the Regional Transport Authority.

It is however contended that the fact that he did so is not really material because there were five other members and even if he was biased, that was unlikely to have affected the decision of the other members. For this proposition reliance is placed on *Sarju Prasad* v. *South Bihar Regional Transport Authority* (3). In

(1) L.R. (1955) 1 Q.B.D. 41.
(2) A.I.R. 1959 S.C. 1376
(3) A.I.R. 1957 Pat. 732.

that case the Regional Transport Authority also consisted of six members, but the Court held that even if one of them be considered to have some bias it could not be concluded that he would have influenced the decision of the majority. *Sarju Prasad's* case (1) was earlier in date than the Supreme Court's decision in *Nageshwararao's* case (2) and the court took the stricter view that the real likelihood, and not the mere possibility, of bias had to be established. This view no doubt accounted for the court's further opinion that the mere fact that one member might be biased would not necessarily be enough to invalidate the decision arrived at by the other members. This decision is therefore distinguishable. In the case before us we have no information as to the individual opinion of the other members of the Regional Transport Authority as to the suitability of the appellants as persons to whom a permit should be granted, and we are unable to exclude the possibility that the opinion of Sri Balmukund Shashtri may have been the decisive factor in the decision arrived at by that authority.

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In the result, therefore, we are of opinion that the learned Judge was right in holding that there is no ground for interfering with the decision of the State Transport Authority Tribunal and that this appeal must fail. It is accordingly dismissed with costs.

Appeal dismissed.

(1) A.I.R. 1957 Pat. 732 (2) A.I.R. 1959 S.C. 1376.

APPELLATE CRIMINAL

Before Mr. Justice Uniyal and Mr. Justice Kailash Prasad

KISHAN SWARUP

v.

THAKUR BRIJENDRA SINGH AND ANOTHER

1961

July 28

Charge framed by the committing Magistrate —Power of the *Sessions Court to withdraw or drop the same—Code of Criminal Procedure,* 1898, *ss.* 226 *and* 227—*Indian Penal Code,* 1860, *ss.* 109, 210, 218 *and* 219.

Prosecution of Sarpanch of Nyaya Panchayat—Sanction of State Government, whether and when necessary—Code of Criminal Procedure, 1898, *s.* 197—*Indian Penal Code,* 1860, *s.* 19.

The Sessions Court has no power to withdraw or drop altogether a charge framed by the Committing Magistrate. Its power under s. 226 or 227 of the Code of Criminal Procedure is limited to altering or adding to the charges so framed.

[One of the accused was committed on a charge under s. 219 and the other under s. 210/109 and the Sessions Court charged them under ss. 218 and 210, respectively].

Rex v. *Alim Uddin* (1) followed.

The Sarpanch of a Nyaya Panchayat is a judge as defined under s. 19 of the Penal Code and as such comes within the provisions of s. 197 of the Code of Criminal Procedure. The protection of s. 197 is, however, limited only to those who hold such office at the time the complaint is filed; the holding of such office at the time the act complained of was committed being immaterial for this purpose.

S. A. Venkataraman v. *State* (2) relied on.

Criminal Appeal no. 31 of 1961, from an order of Ahmad Raza, 1st Assistant Sessions Judge, Agra, dated the 10th October, 1960, in Sessions Trial no. 58 of 1959.

The facts appear in the judgment.

Satish Chandra for the applicant.

A. P. Singh Chauhan, for the respondent.

(1) A.I.R. 1959 All. 77. (2) A.I.R. 1958 S.C. 107.

The Judgment of the Court was delivered by—

UNIYAL, J.:—This is an appeal by the complainant against an order of acquittal.

Briefly stated, the facts which have given rise to this appeal are these. Raghunandan Lal, Respondent no. 2 filed a suit against Kishan Swarup appellant and his uncle for recovery of a sum of money before the Nyaya Panchayat of Nagla Singhi in the district of Agra. It appears from the order sheet of the Nyaya Panchayat that the suit was dismissed for default of the parties on the 28th September, 1955. The order sheet was signed by Respondent no. 1 who was Sarpanch of the Nyaya Panchayat at that time. It appears that an application for execution of the decree was made before the Nyaya Panchayat by Respondent no. 2 and thereupon on the 25th February, 1956, Respondent no. 1 issued a notice to the complainant and his uncle demanding the payment of the decretal amount within fifteen days. The amount not having been deposited within the time allowed a formal decree was prepared on the 10th March, 1956, and was duly signed by Respondent no. 1 as the Sarpanch of the Nyaya Panchayat. In pursuance of the decree, dated the 10th March, 1956, a certificate of non-satisfaction was issued to Respondent no. 2 on the 10th March, 1956, and the application for execution of the decree was transmitted to the court of the Munsif for execution. Subsequently Respondent no. 2 filed a fresh application for execution in the court of the Munsif and thereupon certain property of the judgment-debtor was attached. It is alleged by the complainant-appellant that he came to know about the existence of the decree against him when his property was attached by order of the court of the Munsif. He filed objections before the Munsif in respect of that attachment. The decree-holder, Respondent no. 2, appeared in answer to the summons of the court and

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made a statement that he was not prepared to press the application for execution and that the application may be dismissed. Accordingly on the 19th July, 1958, the execution was struck off and the application for execution was dismissed with costs.

The appellant then filed a complaint on the 16th December, 1958, under sections 218 and 219 Indian Penal Code read with section 109 Indian Penal Code against the two respondents in the court of the Magistrate Ist Class, Agra. He alleged that Respondent no. 1, who was the Sarpanch of the Nyaya Panchayat, Nagla Singhi, had got a false suit filed by Respondent no. 2 and a fraudulent decree prepared against him. He further alleged that Respondent no 2 had applied for execution of the decree knowing that the same was fraudulent. He, therefore, prayed that the two respondents may be prosecuted and punished for the offences under sections 218 and 219 Indian Penal Code.

The learned Magistrate framed a charge under section 219 Indian Penal Code against respondent no. 1 and a charge under section 219 read with section 109 Indian Penal Code against Respondent no. 2 and committed both the accused to stand their trial before the court of sessions on the 11th June, 1959.

When the case came up for trial before the learned Assistant Sessions Judge, Agra, he struck off the charges framed by the Magistrate and substituted new and fresh charges under sections 218 and 210 Indian Penal Code against Respondent nos. 1 and 2, respectively.

Two objections were made before the learned Sessions Judge on behalf of the accused. The first objection was that the Respondent no. 2 Raghunandan Lal could not be prosecuted under section 210 Indian Penal Code without a complaint of the court concerned. It was urged that the offence with which Raghunandan Lal

was charged having been committed in, or in relation to proceedings in a court, he could not be prosecuted without a complaint in writing of such court, or of some other court to which such court was subordinate. The second objection was that the complaint against Brijendra Singh, Respondent no. 1, under section 218 Indian Penal Code could not be taken cognizance of without the sanction of the State Government. Reliance was sought to be placed on the provisions of section 197 of the Code of Criminal Procedure and it was contended that Brijendra Singh being a 'judge' within the meaning of section 19 of the Indian Penal Code at the time when the offence was committed, he could not be prosecuted without the previous sanction of the State Government.

Both the objections prevailed with the learned Sessions Judge and he acquitted the two respondents on the finding that the complaint against them could not proceed without the sanction of the appropriate authority. Sri *Satish Chandra*, learned counsel for the appellant, has urged that the view taken by the learned judge is wholly erroneous. He has pointed out that the learned Assistant Sessions Judge was not justified in dropping the charges under sections 219 and 210/109 Indian Penal Code framed by the Magistrate and substituting in its place entirely new and fresh charges. He pointed out that the learned Assistant Sessions Judge had, by framing new charges, completely changed the complexion of the case so as to attract to it the provisions of sections 195 and 197 of the Code of Criminal Procedure. We are of opinion that there is considerable force in this contention, the learned judge had no jurisdiction to quash the charges framed by the magistrate. In *Rex* v. *Alim Uddin* (1) a Division Bench of this Court held that the sessions court has no

(1) A.I.R. 1959 All. 77.

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power to withdraw or drop altogether a charge framed by the committing magistrate. It was observed that under section 215 of the Code of Criminal Procedure it was the High Court alone which could quash a charge and that the provisions of sections 226 and 227 did not empower the sessions court to substitute a new charge by dropping the charge already framed by the committing magistrate. All that the Sessions Judge could do was to add to or alter the charge. We respectfully concur with that view and hold that the learned Sessions Judge had erred in striking off the charges framed by the Magistrate.

It was next contended by the learned counsel for the appellant that the Assistant Sessions Judge had gone wrong in holding that the provisions of section 197 of the Code of Criminal Procedure applied to the present case. Brijendra Singh, Respondent no. 1, was the Sarpanch of the Nyaya Panchayat of Nagla Singhi on the date of the framing of the decree against the appellant. It is common ground that he had ceased to be Sarpanch of the Nyaya Panchayat on the date when the complaint was made in court. The question, therefore, arises whether the sanction for his prosecution was necessary under section 197 of the Code of Criminal Procedure. The learned Assistant Sessions Judge relied on the judgment of a learned single Judge of this Court in *Rajendra Bahadur* v. *State* (1). We have perused the judgment of that case and we are of opinion that the point which arose there is not relevant for the decision of the present case.

In order to appreciate the objection which was pressed before the court below it is necessary to reproduce the provisions of section 197 of the Code of Criminal Procedure.

(1) Criminal appeal no. 1354 of 1959, decided on 16th May, 1960.

S. 197 (1)—"When any person who is a 'Judge' within the meaning of section 19 of the Indian Penal Code, or when any Magistrate, or when any public servant who is not removable from his office save by or with the sanction of a State Government or the Central Government, is accused of any offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duty, no Court shall take cognizance of such offence except with the previous sanction—

(*a*) in the case of a person employed in connection with the affairs of the Union, of the Central Government; and

(*b*) in the case of a person employed in connection with the affairs of a State, of the State Government".

The expression "Judge" has been defined in section 19 of the Indian Penal Code in these terms:

"The word "Judge" denotes not only every person who is officially designated as a Judge, but also every person—

who is empowered by law to give, in any legal proceeding, civil or criminal, a definitive judgment, or a judgment which, if not appealed against, would be definitive, or a judgment which, if confirmed by some other authority, would be definitive, or

who is one of a body of persons, which body of persons is empowered by law to give such a judgment".

It is not disputed that the Sarpanch of a Nyaya Panchayat comes within the definition of section 19 of the Indian Penal Code. He can certainly be said to be

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one of a body of persons, which body of persons is empowered by law to give a judgment.

The next question that arises for consideration is whether in the present case it was obligatory to obtain the permission of the State Government for the prosecution of Respondent no. 1. Section 197 clearly speaks of a judge who is accused of any offence alleged to have been committed by him while acting, or purporting to act, in the discharge of his official duty. The plain meaning of the section shows that the person concerned must, at the time of the accusation, have been performing the function of a judge and that the charge in respect of which he is being prosecuted must relate to the discharge of his official duty. As we have observed above, Respondent no. 1 ceased to be a judge on the date when the accusation was made against him by the parties, so that the provisions of section 197 would not be attracted to the case. The view which we have taken finds support from the case of *S. A. Venkataraman v. State* (1). That was a case in which the officer concerned was being prosecuted under the provisions of the Prevention of Corruption Act. The question which arose before their Lordships of the Supreme Court was whether the previous sanction of the State Government was necessary for the prosecution of the accused within the meaning of section 7 of the Prevention of Corruption Act. Reference was made before their Lordships to section 197 of the Code of Criminal Procedure and it was pointed out that the provisions of section 6 of the Act were in *pari materia* with section 197 of the Criminal Procedure Code. While considering the scope of section 197 of the Code of Criminal Procedure their Lordships pointed out that the view of the High Courts of Calcutta, Bombay, Allahabad and Nagpur, was that section 197 of the Code affords no

(1) A.I.R. 1958 S.C. 107.

protection to a person who is not a public servant at the time he is accused of an offence before the court, although at the time he committed the offence he was a public servant. The Supreme Court made pointed reference to the cases of *State* v. *Ifzul Rahman* (1) *Prasad Chandra Banerji* v. *Emperor* (2), *Emperor* v. *P. A. Joshi* (3), and *Emperor* v. *Suraj Narain Chaubey* (4) as showing that the ambit of section 197 did not extend to the case of a person who had ceased to be a judge at the time when the accusation was made against him in court.

The learned counsel for the respondents has not been able to point out any case to the contrary. It was faintly argued before us that if section 197 of the Code of Criminal Procedure were made applicable only to the case of a person who is a judge at the time when the accusation is made against him in a court, that would jeopardise the protection which according to the learned counsel has been afforded to public servants in general. In our opinion it is not the function of the court to consider the policy of the legislature except in so far as it is in conformity with the letter of the law. Section 197(1) of the Code is very clear and specific and leaves no room for doubt that before a person accused of an offence can claim protection by virtue of being a judge within the meaning of section 19 of the Indian Penal Code, it must be shown that at the time when the accusation was made against him he was performing the functions and duties of a judge. If he has ceased to be a judge on the date when cognizance of the case is taken against him, the protection afforded by section 197 would not be available to him. This, in our opinion, is the plain natural and commonsense meaning of section 197. It is not, therefore, open to the court to

(1) A.I.R. 1952 Nag. 12
(2) A.I.R. 1948 Bom. 238.
(3) A.I.R. 1945 Cal. 527.
(4) A.I.R. 1958 All. 715

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extend the scope of section 197 to read into it words which do not find place therein.

We are, therefore, of the view that the order of acquittal passed by the learned Assistant Sessions Judge in this case is clearly illegal and must be set aside.

The result, therefore, is that this appeal in allowed. The order of acquittal is set aside. The case will proceed to trial according to law.

Appeal allowed.

APPELLATE CIVIL

Before Mr. Justice Srivastava and Mr. Justice J. Sahai

RAJ RAM CHARAN AGARWALA AND OTHERS (APPELLANTS)

v.

SHRIDHAR MISRA AND OTHERS (RESPONDENTS).

1961
August 24.

Societies Registration Act, 1860, *s.* 12—*If mandatory and not merely directory—If words 'purpose' or 'object' in the Act have been used synonymous—If general body of the Sammelan is included in the expression 'governing body' occurring in s. 12 of the Act—When an individual member of a society has right to bring suit in civil court—Is there automatic discharge of the receiver on termination of proceedings in which he was appointed.*

The dispute relates to the Hindi Sahitya Sammelan, Prayag (Allahabad) which is a body registered under the Societies Registration Act of 1860. The Special Appeals were directed against the decree passed by Oak, J. in exercise of the original civil jurisdiction, of the High Court in three consolidated suits.

The points that required determination were whether there has been any change of purpose of the Sammelan within the meaning of s. 12 of the Societies Registration Act because of the framing of rule 2 of the new Constitution of the Sammelan and whether s. 12 of the Societies Registration Act is merely directory and not mandatory.

It has been *held,*

(*i*) that the provisions of s 12 of the Societies Registration Act are mandatory and not merely directory.

(ii) that the words 'purpose' or 'object' in the Societies Registration Act have been used synonymous and if s. 12 otherwise applies to the present case it cannot be made inapplicable on the ground that the words used therein are 'purpose' or 'purposes' and not 'object' or 'objects';

(iii) that the general body of the Sammelan is included in the expression 'governing body' occurring in s. 12 of the Societies Registration Act;

(iv) that rule 2(*a*) of the new Constitution of the Sammelan has not brought about any change in the 'purpose'

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of the Sammelan and there is thus no infringement of s. 12 of the Societies Registration Act;

(v) that the new constitution of the Sammelan was passed by contravening the provisions of r. 46 of the old constitution and on that ground has not been validly passed and cannot be treated to be effective.

(vi) that the new rules have not been legally framed and are consequently void.

(vii) that on the allegations that the entire proceedings were *ultra vires* and the new rules void it is open to individual members of a society to bring a suit and a civil court can take cognizance of the same;

(viii) that there is no automatic discharge of a receiver merely because the proceedings in which he is appointed terminates if the object for which he was appointed are not achieved.

(ix) that the receiver Sri Jagdish Swarup will continue to act as the receiver till the new office-bearers are elected and take charge of their respective offices.

Case-law discussed.

Special Appeal no. 471 of 1958 (Connected with special appeal nos. 472, 478 and 576 of 1958) from the decision of OAK, J. in Original Suit nos. 1, 2 and 3 of 1956, dated 14th October, 1958.

The facts appear in the judgment.

A. P. Pandey, Ch. Kedar Nath and *S. N. Kacker* for the appellants.

R. S. Pathak, for the respondents.

The Judgment of the Court was delivered by—

J. SAHAI, J.:—These four connected appeals are directed against the decree passed by our brother OAK in exercise of the original civil jurisdiction of this Court in three consolidated suits. The three suits relate to the Hindi Sahitya Sammelan which is a body registered under the Societies Registration Act (No. XXI of 1860) and is hereinafter referred to as the Sammelan. It was constituted several decades ago for the purpose of promoting Hindi language and to develop Hindi literature. In the year 1946 certain

rules were framed for the management of the affairs of the Sammelan. With the prospects of Hindi being recognised as the national language of India in the Constitution it was felt by a large section of the Sammelan that it had become necessary to introduce fundamental changes in the objects, programme and the constitution of the Sammelan. The annual session of the Sammelan for the year 1949 was held in December of that year at Hyderabad and there a resolution was passed appointing a committee of twenty-one members for drafting a new constitution or set of rules for the Sammelan in order to make it fully representative of all the Hindi regions of the country. The resolution *inter alia* provided that the new constitution after being drafted should be placed for approval before a special session of the Sammelan. It is the common case of the parties that the committee of 21 persons mentioned above (hereinafter referred to as the first committee) drafted a constitution and the said draft was placed for approval before the special session of the Sammelan convened at Patna in June 1950 but for certain reasons the same could not be passed in that session. Instead, resolution no. 1 was passed appointing another committee of eleven persons (herein below referred to as the second committee) for drafting a new constitution and one in fact was drafted by the second committee. The next session of the Sammelan was held at Kotah in December 1950 under the presidentship of Sri Jaichand Vidyalankar and though it was intended to put before the delegates assembled there the draft prepared by the second committee it could not be so done as the draft became untraceable. The Kotah session thereupon passed resolution no. 11 which is to the effect that new constitution be prepared by the second committee and the same when drafted would be deemed to have been adopted by the Sammelan if and when it was signed by

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eight out of eleven members of the committee. The second committee drafted another constitution and by the 10th August, 1951, seven of its members signed it. As signatures of eight or more than eight members were required to enforce the constitution Sri Mauli Chandra Sharma who was the convener of the committee called a meeting for 28th of August, 1951, at Allahabad for the consideration of the new constitution (referred to in this judgment as new rules also) but before the meeting could be held one of the members of the second committee appended his signature to the draft constitution on 11th of August, 1951, thus making the number of the signatories to that constitution as eight. Thereafter some of the members of the Sammelan took up the stand that the new constitution had come into force as it had been signed by eight persons. On 28th August, 1951, Sri Sridhar Misra and two others filed civil suit no. 567 of 1951 in the court of Munsif (West) Allahabad against Sri Jaichand Vidyalankar and eleven others *inter alia* on the allegations that the resolution no. 1 passed at Patna special session and resolution no. 11 passed at the Kotah Session were *ultra vires* and inoperative and the new constitution was invalid. The relief claimed in the suit was for a declaration that the resolutions mentioned above and the new constitution were *ultra vires* the Sammelan and were null and void and further that the constitution drafted by the first committee and placed before the Patna Session was the valid constitution. A prayer was also made for a permanent injunction restraining the members of the second committee from meeting on 28th August, 1951 and from approving the draft constitution as also from giving effect to it. This suit was contested by the Defendant no. 2 Sri Rai Ram Charan Agarwal and the Defendant no. 7 Sri Mauli Chandra Sharma who pleaded *inter alia* that the new constitution was a valid one

and in any case the Sammelan being an autonomous body no suit in respect of its internal management was maintainable at the instance of the plaintiffs and further that the plaint was undervalued and the court-fee paid was insufficient. A claim for special costs under section 35-A, Civil Procedure Code was also made. The learned Munsif framed the following issues in the case:

(1) Are resolution nos. I and II of Patna Session and Kotah Session respectively, and draft constitution framed by Defendants nos. 2 to 12 *ultra vires* of the Sammelan and null and void?

(2) Has this Court jurisdiction to try the suit?

(3) Have plaintiffs any interest in the management of the affairs of Defendant no. 1? Have the plaintiffs any right to maintain the suit?

(4) Is the valuation given in the plaint undervalued and indefinite? Is the court-fee paid insufficient?

(5) To what compensation, if any, is, Defendant no. 2 entitled under section 35-A, Civil Procedure Code?

(6) To what relief, if any, are plaintiffs entitled?

On 6th September, 1951, the Sammelan through its Secretary Sri Rai Ram Charan Agarwal filed in the nature of a cross case to Suit no. 567 of 1951, civil suit no. 604 of 1951 in the court of the Munsif (West), Allahabad, against Sri Jaichand Vidyalankar *inter alia* on the allegations that the new constitution had come into force on 11th August, 1951, and the defendant had wrongly called a meeting for 9th September, 1951, of the old standing committee of the Sammelan to consider the question relating to the acceptance or non-acceptance of the new constitution. The relief claimed in the suit was a declaration that the office-bearers of the Sammelan were bound by the new constitution approv-

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ed on 11th August, 1951. There was also a prayer for an injunction restraining the defendant from holding the proposed meeting or acting in accordance with the old constitution (also referred to by me as the old rules). The suit was contested *inter alia* on the allegation that the constitution prepared for being presented and passed at Patna special session had been traced out and was in possession of the defendant and further that resolution no. 1 passed at the Patna Session and no. 11 passed at the Kotah session were *ultra vires* the Sammelan. The following issues were framed in the case:

(1) Whether the new constitution prepared approved and signed on 11th August, 1951, is valid?

(2) To what relief, if any, are the plaintiffs entitled?

In this suit the plaintiffs obtained from the learned Munsif (West), Allahabad, a temporary injunction restraining the President of the Sammelan from considering matters relating to the conduct of the affairs of the Sammelan and the new constitution. Notwithstanding the injunction the meeting called for 9th September, 1951, was held on that date though the President absented himself from it. In this meeting a resolution was passed removing Sri Rai Ram Charan Agarwal from the post of the Secretary of the Sammelan and electing new office bearers.

On the 10th September, 1951, civil suit no. 75 of 1951 was filed by the Sammelan through Sri Rai Ram Charan Agarwal, its secretary, and Sri Rai Ram Charan Agarwal in his personal capacity in the court of the Civil Judge, Allahabad, against Sri Jaichand Vidyalankar and seven others *inter alia* on the allegations that the defendants and their partymen had illegally decided to declare the new constitution null and void and thus

to bring the Plaintiff no. 2 in dispute, that the Defendant no. 1 had decided to call a meeting of the old standing committee of the sammelan on 9th September, 1951, to consider the questions relating to the conduct of the Plaintiff no. 2, the newly prepared constitution and others matters relating to it and had quite illegally removed Plaintiff no. 2 from the office of the General Secretary and elected new office-bearers. The prayer in the suit was that the proceedings held in the meeting of 9th September, 1951, affecting the position of the Plaintiff no. 2 (Sri Rai Ram Charan Agarwal and appointing new office-bearers in place of the old ones be declared *ultra vires* and null and void. A prayer was also made for an injunction restraining the defendants from giving effect to the resolution passed in the meeting held on 9th September, 1951. When the suit was filed there were eight defendants to it. Later on additions were made and ultimately as many as 186 persons were impleaded as defendants. In this suit one written statement was filed by Sri Jaichand Vidyalankar, Defendant no. 1, another by Sita Ram Chaturvedi, Defendant no. 4 and the third one by Sri Prabhat Misra, Defendant no. 8 and five other defendants. The pleas in all the three written statements *inter alia* were that the resolution passed on 9th September, 1951, was valid and effective and that the standing committee was competent to appoint and remove office bearers, that in as much as the suit related to the internal management of the Sammelan it was incompetent, that the same was barred by section 9, Civil Proceding Code as also section 42, Specific Relief Act, that the Plaintiff no. 1 was not properly represented in the suit that the Plaintiff no. 2 was not entitled to maintain it. The following issues were framed in the suit:

(1) Whether the resolution of Sthai Committee passed on 9th September, 1951, affecting the posi-

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tion of Plaintiff no. 2 and appointing new office bearers in place of old ones is *ultra vires* and null and void?

(2) Is Plaintiff no. 1 properly represented for filing this suit?

(3) Is Plaintiff no. 2 entitled to file this suit?

(4) Is the suit barred by section 9, Civil Procedure Code and section 42, Specific Relief Act?

(5) Has the court no power to entertain the suit as framed?

(6) To what relief, if any, are the plaintiffs entitled?

On 25th October, 1951, the learned Civil Judge, Allahabad, appointed Sri Jagdish Swarup, Advocate of this Court, as receiver of the property belonging to the Sammelan and thereafter Sri Jagdish Swarup has been looking after its affairs.

This Court withdrew all the three suits mentioned above to its own file for purposes of disposal and renumbered them. Suit no. 567 of 1951 was numbered as suit no. 1 of 1956. No. 604 of 1951 was numbered as suit no. 2 of 1956, no. 75 of 1951 as no. 3 of 1956 in this Court. The three suits were consolidated with the consent of the parties and were disposed of by one judgment, dated the 14th of October, 1958, by our brother OAK. Issue no. 1 in suit no. 1 of 1956 was answered by him by saying that the constitution prepared in August, 1951, was invalid. Perhaps this finding has been too widely stated by our brother because a reference to his finding on issue no. 3 would show that he only found that rule 2 of the new constitution was void and the other rules in it were valid. Therefore, the result of reading the findings of OAK, J. on issues nos. 1 and 3 together is that it is only rule 2 of the new

constitution which he has found to be invalid. On issue no. 3 his finding was that the suit with regard to the declaration about the invalidity of rule 2 of the new constitution was maintainable but not with regard to the other rules in the constitution. Issue no. 4 he answered against the defendants by holding that the suit had not been undervalued and the court-fee paid was sufficient. Issue no 5 he answered by saying that the Defendant no. 2 was not entitled to any compensation under section 35-A, Civil Procedure Code. After recording these findings our brother OAK decreed the suit in part and granted an injunction prohibiting the enforcement of that part of the new constitution which he had found to have been framed illegally.

The learned single Judge answered issue no. 1 of suit no. 2 of 1956 by saying that the new constitution was invalid. He answered issue no. 2 by saying that the plaintiffs were not entitled to any relief.

In suit no 3 the learned single Judge answered issue no. 1 against the plaintiffs On issue no. 2 he found that the Plaintiff no. 1 was properly represented in the suit. Issue no. 3 he answered by saying that the Plaintiff no. 2 was entitled to file the suit but subject to his findings on issue no. 5 Issue no. 4 was not pressed before him. He however held on this issue that the suit was not barred either by section 9, Civil Procedure Code or by section 42, Specific Relief Act. Issue no. 5 he found against the plaintiffs by holding that the civil court "ought not to entertain this suit." On issue no. 6 he recorded the finding that the plaintiffs are not entitled to any relief. The learned single Judge in the end directed Sri Jagdish Swarup, the official receiver, to hand over charge of the properties belonging to the Sammelan to Sri Jaichand Vidyalankar who was its President in 1951.

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To sum up, the learned single Judge dismissed suits nos. 2 and 3 of 1956 *in toto* but decreed suit no. 1 of 1956 partly. He declared resolution no. 1 of Patna Session and resolution no. 11 of Kotah Session and also the new constitution in so far as the amendment of the objects or purposes (Uddesh) was concerned as invalid. He also directed the defendants "not to give effect to rule 2 of the new constitution until the objects or purpose (Uddesh) are ammended by the Sammelan in accordance with law."

Special Appeals nos 471 of 1958 and 576 of 1958 arise out of suit no. 1 of 1956. The first one has been filed by Rai Ram Charan Agarwal and Sarvasri Purshottam Das Tandon, Ram Briksha Benipuri, Uma Nath, Mauli Chandra Sharma, Bhadant Anand Kaushalyayan and Hindi Sahitya Sammelan through Rai Ram Charan Agarwal its secretary against Sarvsri Shridhar Misra, Ram Nagina Tripathi, Krishna Narain Lal, Jaichand Vidyalankar, Kanhaiya Lal Misra, Prabhat Misra, Krishna Deva Prasad Gaur and Ram Nath Suman and the second one by Sarvsri Sridhar Misra, Ram Nagina Tripathi, Krishna Narain. Lal, Jaichand Vidyalankar, Kanhaiya Lal Misra, Prabhat Misra, Krishna Deva Prasad Gaur and Ram Nath Suman against Sarvsri Rai Ram Charan Agarwal, Purshotam Das Tandon, Ram Krishna Benipuri, Uma Nath, Mauli Chandra Sharma, Bhadant Anand Kaushalyayan and the Hindi Sahitya Sammelan through Rai Ram Charan Agarwal, its secretary. Special Appeal no 472 of 1958 had been filed by the Hindi Sahitya Sammelan through its secretary Rai Ram Charan Agarwal, Rai Ram Charan Agarwal and Sri Purshotam Das Tandon *alias* Raja Munna against Sarvasri Jaichand Vidyalankar, Krishna Deva Prasad Gaur, Ram Nath Suman, Sitaram Chaturvedi, Lakshmi Narain Misra, Rajendra Singh Gaur, Mahesh Datt Misra and Prabhat Misra in suit no. 3 of

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1956. Special Appeal no. 478 of 1958 has been filed by the Hindi Sahitya Sammelan through its secretary Rai Ram Charan Agarwal and Sri Purshotam Das Tandon alias Raja Munna against Sri Jaichand Vidyalankar in original suit no. 2 of 1956.

All the four appeals were listed together before us. In Special Appeal no. 471 of 1958 which has been filed by the defendants the prayer in effect is that suit no. 1 be dismissed in toto, while in Special Appeal no. 576 of 1958 filed by the plaintiffs and some of the defendants the prayer in effect is that the suit should be decreed *in toto* and even with regard to rules, other than rule 2 of the new constitution, a declartion should be given that the same are invalid and void. Special Appeal no. 472 of 1958 has been filed by the plaintiffs and their virutal prayer is that suit no. 3 of 1956 be decreed and a declaration be given that the proceedings in the meeting held on 9th September, 1951, are *ultra vires* and so is the election of the new office bearers in place of the old ones Special Appeal no. 478 of 1958 has also been filed by the plaintiffs and the prayer in effect is that suit no. 2 of 1956 be decreed *in toto* and a declaration be given that the office bearers of the Sammelan are bound by the new constitution and further that an injunction be issued restraining the defendant from acting in accordance with the old constitution Both in Special Appeals nos. 472 and 478 there is also a ground that, in any case, that part of the decree of the learned Single Judge which directs the receiver, Sri Jagdish Swarup, to handover charge to Sri Jaichand Vidyalankar, be set aside.

Mr. *R. S. Pathak* has appeared before us on behalf of the appellants in Special Appeal no. 576 of 1958 and on behalf of the respondants in the other appeals. *Mr. S. N. Kakkar* has appeared for the appellants in Special

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Appeals nos. 471, 472 and 473 of 1958. We will first take Special Appeals nos. 471 and 576 of 1958 Mr. *Kakkar* has challenged the findings of the learned Single Judge to the effect that rule 2 of the new constitution was void and has contended that in the present case there was no application of section 12 of the Societies Registration Act (hereinafter called the Act) and rule 46 of the old constitution was also not violated Mr. Pathak's submission on the other hand is that section 12 of the Act applied to the facts of the present case and that in fact the effect of rule 2 of the new constitution is that the purpose for which the Sammelan was constituted and registered under the Act has been changed. Section 12 of the Act reads as follows:

> "Whenever it shall appear to the governing body of any society registered under this Act, which has been established for any particular purpose or purposes, that it is advisable to alter, extend, or abridge such purpose to or for other purposes within the meaning of this Act, or to amalgamate such society either wholly or partially with any other society such governing body may submit the proposition to the members of the society in a written or printed report and may convene a special meeting for the consideration thereof according to the regulations of the society: but no such purpose shall be carried into effect unless such report shall have been delivered or sent by post to every member of the society ten days previous to the special meeting convened by the governing body for the consideration thereof, nor unless such purpose shall have been agreed to by the votes of three-fifths of the members delivered in person or by proxy, and confirmed by the votes of three-fifths of the members present at a second special meeting convened by the govern-

ing body at an interval of one month after the formal meeting."

It is the common case of the parties that in the instant case the procedure contemplated by section 12 of the Act has not been followed. The point, therefore, that requires determination is whether there has been any change of purpose of the Sammelan within the meaning of section 12 of the Act because of the framing of rule 2 of the new constitution and whether section 12 of the Act is merely directory and not mandatory and consequently its disregard would not affect the validity of rule 2 of the new constitution. We shall first deal with the question whether section 12 is mandatory or merely directory. Though the word 'shall' occurring in section 12 is not conclusive of the section being mandatory, it is highly suggestive of its being so. In the case of *Banwari Lal Agarwala* v. *The State of Behar* (1) their Lordships held as follows:

> "No general rule can be laid down for deciding whether any particular provision in a statute is mandatory, meaning thereby that non-observance thereof involves the consequence of invalidity, or only directory, i.e. a direction the non-observance of which would invalidate, whatever other consequences may occur. In order to decide as to whether a provision is mandatory or directory a court has to consider not only the actual words used but the scheme of the statute, the intended benefit to public of what is enjoined by the provisions and the material danger to the public by the contravention of the same".

The same view was taken by their Lordships in the case of *Rani Drigraj Kuer* v. *A. K. Narain Singh* (2) and *Hari Vishnu Kamath* v. *Ahmad Ishaque* (3). Section

(1) A.I.R. 1961 S.C. 849. (2) A.I.R. 1960 S.C. 111.
(3) A.I.R. 1955 S.C. 233.

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13 of the Act provides that the concurrence of three-fifths of its members is required for the dissolution of a society registered under the Act and if the Government happened to be a member of the society, its consent has also got to be obtained. Section 14 provides that in case of dissolution of the society, its funds are not to be distributed between its members but are to be given to some other society to be determined by the votes of not less than three-fifths of the members present personally or by proxy at the time of the dissolution, or, in default thereof, by a court. These provisions indicate that once a society is formed it should continue and neither its dissolution nor the change of its purposes can be lightly made. Section 17 of the Act provides that even in case of societies which were established before the Act came into force assent of three-fifths of its members has got to be given for purpose of its being registered under the Act. This would show that there is an insistence on the part of the legistature on a majority of three-fifths in respect of all fundamental changes with regard to a society. These provisions it appears to us, to have been framed for public benefit and it is obvious that their contravention is likely to endanger public interest. For these reasons we are of the opinion that the provisions of section 12 of the Act are mandatory and not merely directory.

It was vehemently argued that there is a difference between 'objects' and 'purposes' of a society and it was contended that section 12 would apply when a change in the purposes was sought and not when a mere change in the objects was attempted. In our judgment there is no difference between 'purposes' and 'objects' in the Act. This is made clear by the provisions of sections 2 and 18 of the Act. Section 2 provides that the memorandum of association shall contain the following

things, that is to say—the name of the society; the objects of the society; the names, addresses and occupations of the governors, council, directors, committee, or other governing body to whom, by the rules of the society the management of its affairs is entrusted. It is obvious that the words 'objects of the society' have been used here in the sense of 'purpose'. Section 18 provides that if any society which was established before the Act came into existence wants to get registered it must file with the Registrar of Joint-stock Companies a memorandum showing the name of the society, the object of the society and the names, addresses and occupations of the governing body together with a copy of the rules and regulations of the society certified as provided in section 2, and a copy of the report of the proceedings of the general meeting at which the registration was resolved on. The word used in section 18 is not 'purpose' but 'object'. Section 1 does not speak of object but of purpose. It is however obvious that the two words describe the same thing. In our opinion therefore, the words 'purpose' or 'object' in the Act have been used synonymously and if section 12 otherwise applies to the present case, it cannot be made inapplicable on the ground that the words used therein are 'purpose' or 'purposes' and not 'object' or 'objects. It was also contended that section 12 relates to a change sought to be introduced by the governing body and not to a change or amendment sought to be made by the general body of the delegates assembled at a session of the Sammelan. Section 16 of the Act provides that the governing body of the society shall be the governors, council, directors, committee, trustees or other body to whom by the rules and regulations of the society the management of its affairs is entrusted. The definition is comprehensive enough to include the standing committee as also the general body of delegates assembled at a session of the Sammelan inasmuch as to both of

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them in their own spheres the management of the affairs of the Sammelan is entrusted by the rules. The general body has an overall control over the management of the affairs of the Sammelan and is alone competent under rule 46 of the old rules to amend or alter the rules For these reasons it must be held that the general body of the Sammelan is included in the expression "governing body" occurring in section 12 of the Act.

Before we decide as to whether or not the 'object' or 'purpose' of the society of the Sammelan has been changed, it would first be necessary to consider as to what does the word 'purpose' mean. That word has not been defined in the Act Section 1 of the Act, however uses the word 'purpose' and provides that—any seven or more persons associated for any literary, scientific, or charitable purpose, or for any such purpose as is described in section 20 of this Act, may, by subscribing their names to a memorandum of association, and filing the same with the Registrar of Joint-stock Companies, form themselves into a society under this Act. Here the word 'purpose' has been used in a very wide sense If a literary society is established to promote literature it is founded for a literary purpose. Similarly if a scientific or charitable society is founded, it is established for scientific or charitable purpose. 'Purpose' has been used here in the sense of the main object. It has got nothing to do with the details of the programme of the society or with its activities. The society may draw out a chart of its activities and prepare a programme for its working but that would not be the 'purpose' contemplated by the Act. Section 20 of the Act reads as follows:

> 'The following societies may be registered under this Act:
>
> Charitable societies, the military orphan funds or societies established at the several

> presidencies of India, societies established for the promotion of science, literature, or the fine arts, for instruction, the diffusion of useful knowledge, the diffusion of political education, the foundation or maintenance of libraries or reading-rooms for general use among the members or open to the public, or public museums and galleries of paintings and other works of art, collections of natural history, mechanical and philosophical inventions, instruments, or designs."

This section would also show that the word 'purpose' used therein has been used in a wide or comprehensive sense, that is, in the sense of the main object or the central aim of the society as distinguished from its detailed activities which will naturally be directed towards the attainment of that object. If a society is founded for purposes of promotion of literature, it may, in its rules, provide for variety of activities: as for example, for giving scholarships to deserving students, having a press and a publicity department, having an organisational wing, or for holding essay competitions, or awarding prizes for best books, or for holding annual sessions and conferences or for popularising Hindi language in foreign countries and so on and so forth. These are all the activities or the programme of the society and should not be confused with its purpose. 'Purpose' means the fundamental principles upon which the association was formed and the trust created (see *Milligan* v. *Mitchell*) (1).

In the Oxford Shorter Dictionary the word 'purpose' has been given the following meaning:

> "The object which one has in view; intention, resolution, determination; the object for which

(1) 40 E.R. 85.

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anything is done or made, or for which it exists; and, aim.

In Ramanatha Iyer's Law Lexicon it has been stated:

> "The word purpose means that which a person sets before himself as an object to be reached or accomplished; the aim or end to which the view is directed in any plan, manner, or execution; end or the view itself, design, intention." (*See* page 1053).

In the present case the Sammelan has one aim or purpose, that is, the promotion of Hindi literature and language. In order to achieve this main aim or purpose, it has out of necessity to have subsidiary aims and has to provide spheres in which the work of the Sammelan has got to be carried on in order to achieve the purpose. What was described in rule 2 of the old rules or in rule 2 of the new rules is not the purpose or the main aim but the subsidiary aims, that is, the various activities which the Sammelan wishes to pursue for the achievement of the main aim. Most of the activities in the two rules are common. There has been slight change in other activities but that change is not of a fundamental nature. It is true that rule 2 of both the new as also the old sets of rules is headed as 'Uddesha'. In our opinion the word 'Uddesha' has not been used in the same sense in which the word 'purpose' has been used in sections 1 and 12 of the Act. Whereas the word 'purpose' has been used in those sections in the sense of the general objects for which the society has been established, the word 'Uddesha' in the rules has been used in the sense of more proximate objectives which are sought to be achieved or the targets which are intended to be hit in the fulfilment of the fundamental purpose or principles of association.

The learned Single Judge held that inasmuch as under rule 2(a) of the old constitution the purpose of the Sammelan was "to endeavour for the development and progress of Hindi literature in all its aspects" and the object and purpose of rule 2(1) of the new constitution is "to endeavour constantly for cultural rise of India through development of Hindi language and literature," there has been a distinct departure from the purpose and object of the Sammelan and further that in so far as the same was brought about without following the provisions of section 12 of the Act, rule 2 of the new constitution was invalid With great respect to our learned brother OAK, we find it difficult to share this view. We have already said that there is a difference between purposes and objects on the one hand, and the detailed programme of the activities of a society or the targets which it wishes to hit in order to achieve the purpose on the other. In coming to this conclusion we have been influenced to some extent by the language of section 2 of the Act. The last line of that section reads as follows:

> "A copy of the rules and regulations of the society, certified to be a correct copy by not less than three of the members of the governing body, shall be filed with the memorandum of association."

That section which has already been quoted in an earlier part of this judgment clearly requires that the memorandum of association shall contain the objects of the society. The last lines of this section provide that along with the memorandum of association a copy of the rules and regulations of the society shall be filed. This indicates that the place for the mention of the purpose of a society is the memorandum of association and not the rules. The rules may be a body of provisions framed for the governance of a society but should not be confused with the memorandum of association

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and it should not be forgotten that it is not the rules but the memorandum of association in which the purposes of the society are embodied. In other words the purpose or object contemplated by section 12 of the Act, is the purpose mentioned in section 1 and the object mentioned in section 2 of the Act.

Inasmuch as the memorandum of association not having been filed in this case, is not before us, we do not know what was the purpose for which the Sammelan was established. There is no other document also from which we may gather with any amount of certainty the purpose for which the founders of the Sammelan associated to establish it. Admittedly the Sammelan was founded long before September 1946. The rules (Niyamawali) passed at the Udaipur Session of the Sammelan on 11/12 August and 8th September, 1946, is not the memorandum of association. There is no reason to suppose that rule 2 of the old constitution is a copy of the purposes set forth in the memorandum of association. We cannot, therefore, be sure that by means of the new constitution the purpose for which the Sammelan was originally formed has been changed. Assuming that rule 2 of the old constitution dealt with the "purpose" of the society (Sammelan) it cannot be said that there is such a difference between that rule and rule 2(1) of the new constitution so as to justify the conclusion that the purpose for which the Sammelan was formed has been changed. Even rule 2(1) of the new constitution puts as the object of the society "the development of Hindi language and literature in all its aspects." The only difference between the two rules is that in rule 2 of the old constitution the purpose is "development and progress of Hindi literature in all its aspects," in rule 2 of the new constitution the development of Hindi language and literature is to be achieved with a view to bring about the cultural rise

of India. It is true that development of the language or literature will be simultaneous with the cultural rise of the region or the State or the nation in which that language is used. The two are bound to proceed side by side. It appears to us that even under rule 2(a) of the old constitution the efforts of the Sammelan in developing Hindi literature would have resulted in the cultural rise of India especially when Hindi has been accepted as the national language of the country. The cultural rise of a country includes the development and progress of its language and literature. The new rule 2(a) cannot therefore be held to have introduced any fundamental change. It has only brought out what was inherent in the old rule 2. Our brother OAK also agreed that the idea of development of Hindi literature is common to both the constitutions, but held that a change of purpose had been brought about because he thought that there was a change in emphasis. Another ground on which he held that the purpose of the Sammelan had been changed is because of rule 2(b) of the new constitution. Rule 2(b) of the new constitution as translated in English by him reads as follows: "To popularise Hindi language and literature in the foreign countries". He held that inasmuch as the old constitution did not put any such object in its rules, there had been a change in the purpose of the Sammelan. In our opinion the words "to endeavour for the development and progress of Hindi literature in all its aspects" occurring in rule 2(a) of the old constitution are wide enough to embrace in their ambit the popularisation of Hindi language and literature in foreign countries. In a matter like this one need not be very technical and the purposes of a society have to be widely construed. The aim or the object with which or the purpose for which broadly speaking the Sammelan was founded was to develop and popularise Hindi literature in all its aspects. The expansion of Hindi in our

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own country or its popularisation in foreign lands will be included in the development and progress of Hindi literature in all its aspects. It would be noticed that in rule 2(*a*) of the old constitution the words used are "development and progress of Hindi literature in all its aspects". The important words are "development, progress" and "in all its aspects". In our judgment the context in which these words are used in rule 2(*a*) of the old constitution justifies the conclusion that they comprehended not only the development and progress of Hindi literature but also an endeavour to raise the country culturally by its development including its popularisation in the foreign lands. We have to give full meanings to the words "development" and "progress" and "in all its aspects". If the purpose of the Sammelan had been only to develop Hindi literature, the words 'in all its aspects' would not have been used. The change of purpose contemplated by section 12 of the Act is a more fundamental change, as for example, the purpose of the Sammelan being changed to the development of Urdu literature from Hindi literature. For these reasons we are of the opinion that rule 2(*a*) of the new constitution has not brought about any change in the purpose of the Sammelan. There is thus no infringement of section 12 of the Act.

The next question to be considered is whether the finding of our brother OAK that the new constitution was passed in violation of rule 46 of the old rules is correct. That rule as translated into English by our learned brother OAK reads as follows:

> "46. (*a*) The delegates present in the Sammelan shall have power to amend these rules. The members of the Standing Committee and the affiliated provincial Sammelans shall have the right to move proposals for amendment, and such proposals

should reach the General Secretary at least two months before the session of the Sammelan. It shall be the duty of the General Secretary to send for publication in newspapers the proposals for amendment of rules and put them up before the Standing Committee. The Standing Committee shall place each of these proposals before the next session together with its own views

(*b*) The proposals for amendment of rules shall, like other proposals, be placed before the Sammelan by the Subjects Committee, and they shall, like other proposals, be passed by a majority of votes of the delegates Only for shifting the head office, it shall be necessary that two-thirds of the delegates present, excluding the delegates residing in the city where the session of the Sammelan is held, should support the proposals for changing the place."

It was held by OAK, J. that the new Constitution was not framed in accordance with the provisions of rule 46 of the old constitution, because the delegates present in the meeting of the Sammelan alone could amend the rules and that power could not be delegated by them to the second committee. On behalf of the appellant it is contended that the view of the learned Single Judge is wrong and there was no bar to the delegates of the Sammelan delegating that power to a sub-committee. It is common ground that there is no express provision in the old constitution under which the general body could delegate their functions to a committee. It appears to us that though there was no legal objection to the general body appointing a committee to draft a constitution they could not have provided that if and when eight or more of the members of the committee gave their assent to the draft constitution prepared by the committee the same would be effective

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and would be a valid constitution without being placed before the general body. Reading rule 46 it appears to us that there is no scope for the submission that the general body could have authorised eight or more members to pass the constitution. We are of the opinion that in allowing this to be done, the general body abdicated its functions and that part of the resolution cannot be supported. It would contribute towards a correct understanding of the scope of rule 46 if some portions of the rule were read in original. Those words are as follows:

> "In niyamon men parivartan ka adhikar Sammelan ke upasthit pratinidhiyon ko hoga. Parivartan ke prastav karne ka adhikar sthai samiti ke sadasyon tatha sambaddh Prantiya Sammelanon ko hoga aur aise prastav Sammelan ke adhiveshan se kam se kam do mas pahile Pradhan Mantri ke pas aa jane chahiya.
>
> (kha)—Niyamon ke parivartan ka prastav anya prastavon ki bhanti sammelan men visaya nirvachan dwara upasthit kiya jayga aur anya prastavon ki bhanti pratinidhiyon ki adhikansha sammati se swikrit hoga."

The opening words of the rule clearly provide that the delegates assembled at a session of the Sammelan alone shall be competent to change the rules. It is true that word 'alone' is not there but that seems to be the effect of the language used. Secondly, the resolution relating to the amendment or change of the rules has got to be placed in a meeting of the Subjects Committee and has got to be passed by a majority of the members there. This means that before the rules can be amended or changed they must be placed before the Subjects Committee. This can only be done if the delegates themselves amend the rules. No question of

putting before a Subjects Committee can arise if the powers to change the rules have been given to a committee appointed by the Sammelan in the present case the second committee. It is well established that if a power is required to be exercised in a particular manner it must be exercised in that manner or not at all. See *Taylor* v. *Taylor* (1), *Nazir Ahmad* v. *Emperor* (2), *Hari Vishnu Kamath* v. *Ahmad Ishaq* (3). We are also clear in our mind that a function so essential and fundamental in its nature cannot be delegated without there being any provision in the old constitution authorising such a delegation. Rule 16 appears to us to be a mandatory provision. A study of the various rules contained in the old constitution lead us to the conclusion that rule 46 is not directory and its disregard cannot be treated to be a mere irregularity. It is well known that when powers are given to a person, corporation or an authority, the same cannot be delegated unless there is an express provision authorising the delegation. See *Cook* v. *Ward* (4). The function relating to the preparation of the new constitution or rules is an essential legislative function which the Sammelan itself must perform.

In Corpus Juris Secondum, Vol. 14, the question of the amendment or change in the constitution or the rules has been summarised in the following words on pages 1282 and 1283:

> "If a Club adopts a constitution and by-laws they constitute a contract between the Club and its members, binding on both, whether the Club is incorporated or not. . . . . A by-law of a Club can be adopted only on compliance with the provisions, if any, in the by-laws therefore, and key-laws, which are permanent and continuing rules

(1) 1876) 1 Ch. D. 426.
(2) A.I.R. 1938 F.C. 253.
(3) A.I.R. 1955 S.C. 233, 248
(4) II L.R., Common Plea Division 255.

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of Government, can be amended or repealed only in the manner prescribed by the by-laws."

The law as stated in Corpus Juris Secondum, in our opinion is also applicable to societies registered in India. For these reasons, in our judgment, the new constitution was passed by contravening the provisions of rule 46 and on that ground has not been validly passed and cannot be treated to be effective. We may also state that apart from the fact that the general body (the delegates assembled at a session) did not pass the constitution and it is invalid on that ground, the new constitution also suffers from another defect and that is, that the procedure provided by rule 46 of the old constitution has not been followed. That rule requires that before the rules are amended or repealed a resolution to that effect should be moved by one of the members of the Standing Committee (asthai Committee) and that such a resolution must reach the Secretary of the Sammelan at least two months before the commencement of the session of the Sammelan. It also requires that when such a resolution is received it shall be published in newspapers and that that resolution should be placed before the meeting of the Standing Committee who will place it before the delegates of the Sammelan in one of its sessions along with their own suggestions. It is common ground that none of these conditions were observed in the present case. In fact, there could be no occasion for the observance of these conditions because the Sammelan had passed resolution no. 11 authorising the Standing Committee to draft a constitution and providing that if eight or more than eight of its members signed it, the same would be deemed to be a valid constitution. Most of the procedure provided in rule 46 referred to above, appears to us to be mandatory and not merely directory. Its disregard, in our opinion, also renders the

second constitution ineffective. We may state that rule 46 is not only a procedural provision meant solely for the purpose of the convenience of the Sammelan or its committees. Its functions are much more fundamental. It deals with the question of jurisdiction also inasmuch as it confers on the delegates assembled at the session of the Sammelan (the general body) alone the jurisdiction to amend, alter, or change the rules. There is good authority for the proposition that if a rule or by-law has been framed by a corporation for its convenience and only to guide itself in the conduct of its business, its disregard is not actionable. See *Municipal Board, Shahjahanpur* v. *Sardar Sukha Singh* (1). The provisions and the scheme of the Act show that in establishing a society different persons associate and the memorandum of association as also the rules amount to an agreement between them governing their relationship. It was held in the case of *Noel Frederick Barwell* v. *John Jackson* (2) that the relationship between the members of unincorporated members club is governed by the law of contract and if the members have agreed to certain terms which are embodied in the rules then in existence or to be made thereafter in accordance with that terms agreed upon by the members, those rules must govern their relationship. By framing rule 46 the delegates agreed not to change the rules or the constitution except by an act of theirs and after following the procedure provided by that rule. Even a majority cannot destroy the effect of that contract incorporated in rule 46 without first deleting or amending that rule in accordance with the law.

It has been urged that when the general body passed a resolution to the effect that if eight or more persons signed the draft rules the same would be effective it must be deemed that the Sammelan passed the rules when eight members of the second committee signed

(1) A.I.R. 1937 All. 264. (2) 1917 A.L.J. 637.

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it. Whereas we have no doubt that it was open to the Sammelan to have appointed a committee to frame draft rules, it could not have left to that committee or eight or more of its members to act for the general body We are conscious that a function like the drafting of rules could not, by its very nature, be performed or properly performed by the delegates and a much smaller body was needed for the same. If the delegates had only left the matter at that there could be no difficulty. But they have done much more In fact, they have abdicated themselves in favour of eight or more members of the second committee. In the case of *Pradyat Kumar* v. *The Chief Justice of Calcutta* (1), one of the grounds of attack against the order dismissing Pradyat Kumar from the post of the Registrar, Original Side of the Calcutta High Court, was that the Chief Justice had left it to a brother Judge to conduct an enquiry into the charges framed against Pradyat Kumar and an argument was advanced that that could not be done. While repelling the submission the Supreme Court observed as follows:

> "It is well recognised that a statutory functionary exercising such a power cannot be said to have delegated his functions merely by deputing a responsible and competent official to enquire and report. That is the ordinary mode of exercise of any administrative power. What cannot be delegated except where the law specifically so provides—is the ultimate responsibility for the exercise of such power"

These words in our judgment also apply to a case like ours and we are of the oinion that there was no objection to the delegates having appointed the second committee so draft the constitution but they should

(1) A.I.R. 1956 S.C. 285.

have shouldered their ultimate responsibility deciding whether or not the draft constitution prepared by that committee should be passed. For the reasons mentioned above, in our judgment the second constitution has not been validly passed.

The question however that still remains to be considered is whether the suit relates to the internal management of the Sammelan or not and whether a civil court has jurisdiction to entertain such a suit It is true that a society is a juristic person separate from its member as is a company. See *Boppana Rukminamma* v. *Maganti Venkata Ramadas* (1). Therefore, the normal rule is that in respect of the internal management of the society, the society as such and not its individual members can sue. There have been a large number of cases both in India as also in England where courts had to consider whether a suit can be brought in respect of the internal management of a company otherwise than in the name of the company itself, by individual members thereof. There is good authority for the proposition that the case of society registered under the Act is similar to that of a club or a joint-stock company (See *A. S. Krishnan* v. *M. Sundaram*) (2). A Full Bench of this Court in the case of *Noel Frederick Barwell* v. *John Jackson* (3), has held that the same principles apply to a club which applied to a joint-stock company. In the leading case on the subject *Foss* v. *Harbottle* (4), it was held that the normal rule is that the corporation should sue in its own name and in its corporate character, or in the name of some one whom the law has appointed to be its representative. *Mozley* v. *Alston* (5) is an authority for the proposition that ordinarily individual share-holders cannot sustain a Bill in their own names in respect of a matter common to all or relating to the internal management of the company. In

(1) A.I.R. 1949 Mad. 948.
(2) 1947 A.L.J. 637.
(3) A.I.R. 1941 Bom. 318
(4) 11 Hare 461
(5) (1847) 16 L.J.R. 217.

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the case of *Mac Doughall* v. *Gardiner* (1) the court held that it could not interfere in the internal management of a company and dismissed an action brought by one share-holder on behalf of himself and all other share-holders excluding the Directors, against the Directors and the company complaining against certain matters decided at a meeting. To the same effect is the decision of the Bombay High Court in *Bhajekar* v. *Shinkar* (2) and of the Madras High Court in *Nagappa* v. *Madras race club* (3). The Bombay High Court took the same view in *Satyabrat Siddhantalankar* v. *Arya Samaj Bombay* (4) which was a case of a registered society. This general rule however has got an exception as pointed out in the Madras and Bombay cases referred to above. The exception is that a share-holder can bring an action with regard to an internal management of a company if (1) the action of the majority is *ultra vires* the company; (2) where the act complained of constitutes a fraud on the minority; (3) where the action of the majority is illegal; and (4) where a special resolution is required by the Article of the company and the assent of the majority to such special resolution is obtained by a trick, or even where a Company authorised to do a particular thing only by a special resolution does it without a special resolution duly passed. In our case the complaint of the plaintiffs was that the majority of the delegates of the Sammelan acted without jurisdiction in resolving that if eight or more members of the second committee signed the draft rules prepared by it the rules would become effective and that inasmuch as the new rules were brought into force without following the procedure provided by rule 46 and section 12 of the Act, the entire proceedings were *ultra vires* and the new rules void. In our judgment, on allegations like these it is open to individual members of a

(1) (1875-76) 1 Ch. 13.
(2) A.I.R. 1931 Bom. 248
(3) A.I.R. 1951 Mad. 83.
(4) A.I.R. 1936 Bom. 516

society to bring a suit and a civil court can take cognisance of the same The plaintiffs in the suit giving rise to this appeal are members of the Standing Committee of the Sammelan and as such are interested in its affairs For these reasons we are of the opinion that there is no difficulty in the way of this Court holding that new rules have not been legally framed and are consequently void The result of this conclusion is that Special Appeal no. 471 of 1959 fails and Special Appeal no. 576 of 1958 should be allowed

We now come to Special Appeal no. 472 of 1958. After the institution of the appeal an application was made in this Court for permission to withdraw the appeal. This prayer was objected to by the respondents On 22nd October, 1959, a Bench of this Court consisting of MOOTHAM, C. J. and DAYAL, J. allowed the application to the extent that Rai Ram Charan Agarwal, one of the appellants, was permitted to withdraw from the appeal and his name was directed to be expunged from the array of the parties At the time of the hearing of the appeal Mr. S. N. Kakkar, learned counsel for the appellants stated that inasmuch as the new office-bearers were elected for one year only on 9th September, 1951, and that period had expired, they were no longer in office and consequently so far as the merits were concerned the appeal had become infructuous and as such he did not wish to press it on merits He also stated that he wanted to confine his submissions only with regard to that part of the decree of the learned Single Judge wherein he had directed the receiver Sri Jagdish Swarup to hand over charge to Sri Jaichand Vidyalankar. In view of that statement and the fact that Sri Rai Ram Charan Agarwal, who was the main aggrieved party, has withdrawn from the appeal, the same must be substantially dismissed and all that we need consider is whether the direction given by our brother OAK

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that Sri Jagdish Swarup should hand over charge to Sri Jaichand Vidyalankar should be maintained. It has been contended that after the expiry of one year from the date of his election Sri Jaichand Vidyalankar ceased to be the President of the Sammelan. This one year admittedly expired before September, 1951. Mr. *Pathak* on the other hand has contended that there is authority for the view that a director continues in the office till his successor is elected. He submitted that inasmuch as a successor to Sri Jaichand Vidyalankar had not been elected, he should be deemed to be continuing as the President of the Sammelan even today and therefore he is entitled to receive charge from Sri Jagdish Swarup. In our judgment in view of the fact that the period for which Sri Jaichand Vidyalankar was elected expired long ago and he has not been functioning as a President for more than a decade in view of the appointment of a receiver, it will not be proper to hand over charge of the Sammelan to him. The interest of the Sammelan in our opinion be served better and there can be no doubt that it is the interest of the body which is to be the primary consideration if the receiver is allowed to continue till the next annual session of the Sammelan is held and a new set of office-bearers including the President is elected in accordance with the old rules. The receiver should take early and effective steps to get election held as soon as possible. No case on facts similar to ours has been cited by the learned counsel for the parties which can justify any other conclusion. In our judgment therefore that part of the decree which directs Sri Jagdish Swarup to hand over charge to Sri Vidyalankar should be set aside. It is necessary that the receiver should continue till the office-bearers are elected, and we direct him accordingly, even though the appeals are being finally decided. we see no legal hurdle in the way of allowing Sri Jag-

dish Swarup to continue till the elections take place. The object for which Sri Jagdish Swarup was appointed has not yet been achieved even though the proceedings relating to the litigation between the parties are coming to a close. There is no automatic discharge of a receiver merely because the proceedings in which he is appointed terminate if the object for which he was appointed are not achieved, see *Haji Ramzan Moosakhan* v. *Haji Abubucker* (1) and *Muthu Vira Reddi, Rami Reddi* v. *Mayandi, Venkatesa Modali* (2).

In the present case we consider it not only desirable but imperative that the receiver should continue and Sri Jagdish Swarup should not be directed to hand over charge till a fresh election is held. For the last ten or eleven years there has been no election of office-bearers. It is therefore necessary that, election should be held and the receiver being an independent person is best fitted for making the necessary arrangements in that regard. We, therefore, set aside that part of the decree of our brother OAK and direct that Sri Jagdish Swarup will continue to act as the receiver till the new office-bearers are elected and take charge of their respective offices. He shall forthwith take steps to hold an election. After the elections have taken place Sri Jagdish Swarup shall hand over charge to the new President.

With regard to Special Appeal no. 473 of 1958 we may state that while dealing with Special Appeals nos. 471 and 576 of 1958 we have already found that the new rules are invalid. In view of that finding the suit of the plaintiffs, who are the appellants before us, has been rightly dismissed. The only submission made is that the direction of our brother OAK that Sri Jagdish Swarup should hand over charge to Sri Jaichand Vidyalankar should be set aside. While dealing with

(1) A.I.R. 1945 Sind 75. (2) A.I.R. 1950 Mad. 67.

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Special Appeal no. 472 of 1958 we have already said that such a direction is liable to be set aside.

The result is that Special Appeal no. 471 of 1958 is dismissed and Special Appeal no. 576 of 1958 is allowed. Special Appeals nos. 472 and 473 of 1958 are dismissed except to the extent mentioned above. The parties shall bear their own costs throughout.

Appeal dismissed.

CRIMINAL MISCELLANEOUS

Before Mr. Justice Uniyal and Mr. Justice Ramabhadran.

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Review in Criminal Appeal—*Of the judgment and order passed by the High Court in appellate jurisdiction—If the High Court has jurisdiction to grant under s. 561-A Code of Criminal Procedure, 1898—Effect of the refusal by the Supreme Court to grant special leave to appeal and the remedy available.*

The applicants were convicted under s. 302, Indian Penal Code by the Sessions Judge, Nahil Tal. Sadhu Singh was sentenced to death while the remaining applicants were sentenced to life imprisonment. Their appeal was dismissed by the High Court on 12th July, 1960, and an application for leave to appeal to the Supreme Court was also dismissed. Thereafter they moved the Supreme Court by means of a petition for special leave to appeal but it was rejected.

The applicants now applied to this Court under section 561-A, Code of Criminal Procedure for review of the appellate order of the High Court, dated 12th July, 1960, with a request to summon fresh evidence and to re-examine the case in the light of new facts brought to its notice. A preliminary objection was raised on behalf of the State that the applications for review filed by the applicants were not maintainable.

The Court after considering in detail—

Held, (i) that so long as the order of dismissal of petition for special leave to appeal by the Supreme Court stands the High Court would be *functus officio* and it could not review or alter its judgment in the purported exercise of its inherent powers.

(ii), that once the Supreme Court has dismissed a petition for special leave to appeal in a criminal case the High Court ceases to have jurisdiction over that matter and has no power to entertain a review application which would have the effect of disturbing the order made by the Supreme Court.

(iii), that there is a remedy available to the applicants to approach the Supreme Court under Article 137 of the Constitution to review its order dismissing their petition for special

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leave to appeal so as to have the matter re-opened in the ends of justice.

(iv), that the inherent power of the High Court under s. 561-A Code of Criminal Procedure cannot be invoked where another remedy is available and further that the powers so exercised cannot be made to over-ride the express provisions of law.

(v), that the inherent powers which were preserved to the High Court under s. 561-A. Code of Criminal Procedure did not include power to review its judgment on grounds analogous to O. XLVII, r. 1. Code of Civil Procedure and so the High Court does not possess an inherent power to review its judgment on the grounds of discovery of new matters or evidence in criminal matters.

(vi), that we are here concerned with the review of an appellate order of the High Court and therefore s. 430, Code of Criminal Procedure will apply giving finality to such order and there being no provision in the Code of Criminal Procedure empowering the High Court to review its appellate judgment or order s. 561-A, Code of Criminal Procedure cannot over-ride an express provision of the Code by inventing a new category of inherent jurisdiction.

(vii), that there may be cases such as of clerical mistakes or hearing not according to law, etc. where the High Court may exercise its inherent jurisdiction to make consequential amendments in its order but there the inherent power is being exercised to further the ends of justice and the Court is not called upon to reassess the evidence or to introduce fresh material on the record for the purpose of deciding the matter.

Case-law discussed.

Criminal Misc. Case no. 334 of 1961 (connected with Criminal Miscellaneous Case no. 573 of 1961).

T. Rathore, G. N. Verma, Devendra Bahri and *S. R. Dwivedi*, for the applicants.

The Government Advocate (*B. D. Gupta*) and Assistant Government Advocate (*B. N. Katju*), for the State.

The Judgment of the Court was delivered by—

UNIYAL, J.:—The applicants were tried for the offence of murder by the Sessions Judge, Naini Tal, and were convicted under section 302, I. P. C. by an order, dated 10th April, 1960. Sadhu Singh was sentenced to death while the remaining applicants were

sentenced to imprisonment for life. Their appeal was dismissed by the High Court on 12th July, 1960 which confirmed the death sentence passed on Sadhu Singh. The applicants then applied for leave to appeal to the Supreme Court but the same was dismissed by the High Court on 11th August, 1960. Thereafter they moved the Supreme Court by means of a petition for special leave to appeal but it was also rejected by an order dated 13th October, 1960.

The applicants have now applied to this Court under section 561-A, Cr. P. C. for review of the appellate order of the High Court, dated 12th July, 1960 on the allegation that the site-plan prepared by the investigating officer and relied upon at the trial was a forged document and that perjured evidence had been produced by the prosecution in support of its case. This Court is, therefore, asked to summon fresh evidence and to re-examine the case in the light of new facts brought to its notice.

A preliminary objection has been raised by the learned Assistant Government Advocate that the applications for review filed by the applicants are not maintainable. It is contended that the dismissal by the Supreme Court of their objection for special leave to appeal amounts to a final order and the High Court is *functus officio* and has no jurisdiction to question or disturb the said order in any way.

In reply the learned counsel for the applicants contended that the order of the Supreme Court refusing to grant special leave to appeal was not a final order as the judgment of the High Court could not be said to have merged in the order passed by the Supreme Court. He argued that the High Court's power of review under section 561-A, Cr. P. C. was not affected by the order of the Supreme Court dismissing petition for special leave to appeal.

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The first point that falls to be dealt with is whether the rejection by the Supreme Court of the applicants' petition for special leave to appeal amounts to a final order and, as such, operates as a bar to the maintainability of the review applications filed by the convicted persons.

Under Article 136 of the Constitution the Supreme Court has discretion to grant special leave to appeal from any judgment, sentence or order passed by the High Court. In exercise of its rule-making power under Article 145 the Supreme Court has framed rules which are called the Supreme Court Rules, 1950. Rule 3 of Order XXI of the Supreme Court Rules says that a petition for special leave to appeal in criminal proceedings shall state succinctly and clearly all such facts as may be necessary to state in order to enable the court to determine whether special leave to appeal ought to be granted. Rule 4 provides that the petition shall be accompanied by a certified copy of the judgment or order sought to be appealed from and the affidavit prescribed therefor. Rule 9 states that on the granting of the petition the petition for special leave to appeal shall be treated as a petition of appeal and shall be registered and numbered as such.

The Supreme Court Rules indicate that the granting of a petition for special leave to appeal would amount to the admission of the appeal itself. It would follow that the dismissal of such a petition would likewise be regarded as the dismissal of the appeal. In other words, the order of dismissal would have the effect of affirming the judgment or order passed by the High Court. It is thus evident that so long as that order (of dismissal) stands the High Court would be *functus officio* and it could not review or alter its judgment in purported exercise of its inherent power.

The matter may be looked at from another point of view. Supposing that the High Court possessed an inherent power of review, then it may either revoke its judgment or confirm it. In either event, the aggrieved party would have, we imagine, a right to move the Supreme Court again by means of a petition for special leave to appeal from this order of the High Court. The question then arises whether the order of the Supreme Court dismissing the petition of the convicted persons for special leave to appeal would stand in the way of a fresh petition for special leave to appeal to the Supreme Court. We think that if it is held that the order made by the Supreme Court under Article 136 is a final order, then a second petition for special leave to appeal in the same case would not lie to the Supreme Court. This would be so because there is no provision in the Constitution empowering the Supreme Court to permit the parties to a case to file a second petition for special leave to appeal in the same matter. The logical conclusion that flows from the above discussion is that once the Supreme Court has dismissed a petition for special leave to appeal in a criminal case the High Court ceases to have jurisdiction over that matter and has no power to entertain a review application which would have the effect of disturbing the order made by the Supreme Court.

This becomes apparent from the fact that under Article 137, the Supreme Court has been invested with an express power to review any judgment pronounced or made by it, while no such power has been conferred on the High Court under section 561-A, Criminal Procedure Code. The power of review which is possessed by the Supreme Court is wide and unfettered. Order XLV, rule 5, of the Supreme Court Rules provides that "nothing in these Rules shall be deemed to limit

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or otherwise affect the inherent powers of the court to make such orders as may be necessary for the ends of justice, or to prevent abuse of the process of the court." There is thus a remedy available to the applicants to approach the Supreme Court under Article 137 of the Constitution to review its order dismissing their petition for special leave to appeal so as to have the matter re-opened in the ends of justice.

We are clearly of the opinion that in the circumstances of the case the High Court has no jurisdiction to entertain these applications.

Learned counsel for the applicants vehemently contended that the High Court possessed inherent jurisdiction to review its judgment and to re-open the case by directing fresh evidence to be adduced. Since the matter was argued at great length we consider it necessary to make a few observations on this question.

Section 561 A, Cr. P. C. does not confer any new power in the High Court. It merely preserves the inherent powers possessed by it and does enlarge them. It was held by the Privy Council in *Jairam Das* v. *Emperor*, (1), that—

> "this section gives no new power; it only provided that those which the court already inherently possesses shall be preserved and is inserted, as their Lordships think, lest it should be considered that the only powers possessed by the court are those expressly conferred by the Criminal Procedure Code and that no inherent power had survived the passing of that Act."

To the same effect are the observations of the Supreme Court in *Talab Haji Husain* v. *Madhukar Purshottam* (2). It was observed at page 378 that—

> "It is only if the matter in question is not covered by any specific provision of the Code that section

(1) A.I.R. 1945 P.C. 18. (2) A.I.R. 1958 S.C. 376.

561-A can come into operation, subject further to the requirement that the exercise of such power must serve either of the three purposes mentioned in the said section."

It would thus appear that the inherent power of the High Court under section 561-A cannot be invoked where another remedy is available, and further that the powers so exercised cannot be made to over-ride express provisions of law.

Section 561-A does not invest the High Court with the power to review its judgment which has been arrived at after hearing the parties and in accordance with law. Section 561-A, Criminal Procedure Code saves the inherent powers of the High Court in Criminal matters just in the same way as section 151, C. P. C saves the inherent powers of the High Court in civil matters.

A comparison between the provisions of section 561-A, Criminal Procedure Code and those of section 151, Civil Procedure Code will bring out the scope and content of the inherent powers possessed by the High Court in respect of its criminal and civil jurisdiction respectively. Section 561-A, Criminal Procedure Code runs thus—

> "Nothing in this Code shall be deemed to limit or affect the inherent power of the High Court to make such orders as may be necessary to give effect to any order under this Code, or to prevent abuse of the process of any court, or otherwise to secure the ends of justice."

Section 151, Civil Procedure Code is in these terms—

> "Nothing in this Code shall be deemed to limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the

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ends of justice or to prevent abuse of the process of the court."

The two sections are almost in identical terms and have the same purpose in view. The Legislature incorporated section 561-A in the Criminal Procedure Code in 1923. It was aware that a similar provision existed in the Civil Procedure Code in regard to the inherent powers of the High Court in Civil matters and must, therefore, be deemed to have clearly understood the scope and ambit of the inherent powers which could be exercised by the High Court under section 561-A, Criminal Procedure Code. The Legislature has expressly provided for review of judgment in the Civil Procedure Code but no such provision finds place in the Criminal Procedure Code. This clearly goes to show that the inherent powers which were preserved to the High Court under section 561-A, Criminal Procedure Code did not include power to review its judgment on grounds analogous to Order XLVII, rule 1, C. P. C. We have, therefore, no doubt in our minds that High Court does not possess an inherent power to review its judgment on the ground of discovery of new matter or evidence.

It was next contended that section 369, Criminal Procedure Code did not in terms apply to the appellate judgments of the High Court and, therefore, the High Court could in appropriate cases alter or review its judgment. It is true that section 369 has no application to the judgment or order rendered by the High Court as an appellate court. The finality of judgments or orders passed in appeal by the High Court is the subject of section 430, Criminal Procedure Code, which provides that judgments and orders passed by an appellate court upon appeal shall be final, except in the case provided for in section 417 and Chapter XXXII, that is to say, except in the case of an appeal by the State

Government against an order of acquittal, or in the case in which the court exercises its powers of reference or revision.

We are here concerned with the review of an appellate order of the High Court and, therefore, section 430 Criminal Procedure Code will apply in full force. It has already been pointed out that there is no provision in the Criminal Procedure Code empowering the High Court to review its appellate judgment or order. Section 561-A cannot, therefore, over-ride an express provision of the Code by inventing a new category of inherent jurisdiction. In our view section 561-A cannot be invoked so as to make justice illusory, for if the High Court were allowed to upset its final judgment or order that would spell the end of justice. It would mean that no finality was to be attached to an appellate order of the High Court, with the result that it would be open to a party to assail it as and when it suited him. It would be shocking if no sanctity were to be attached to the appellate judgments of the High Court which have been reached after full consideration of the merits of the case. It is a proposition to which no court of law can subscribe.

Strong reliance was placed by the learned counsel on the Full Bench case of *Raj Narain* v. *State* (1). Certain observations made by DAYAL, J. in that case were cited before us and it was contended that the High Court had power in appropriate cases to review its appellate judgment. We may point out at the very outset that the observations made in *Raj Narain's* case (1) have no bearing in the present case because there the question before their Lordships was whether the High Court had power to review its earlier decision in a criminal revision and to re-hear the same. It is sufficient to point out that under section 430 Criminal Procedure Code an exception has been made with respect to orders made in re-

(1) A.I.R. 1959 All. 595

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ferences and revisions by the High Court, and it is stated therein that no finality is to be attached to such orders. It was on this footing that the Full Bench in *Raj Narain's* case (1) came to the conclusion that in exercise of its revisional jurisdiction it had the power to review its earlier order under section 561-A Criminal Procedure Code. The observations in that case, have, therefore, to be read in the context of the facts of that case.

It was clearly pointed out by DAYAL, J. that section 561-A did not confer an inherent power in the High Court to review orders made in appeals. DAYAL, J., while reviewing cases dealing with inherent jurisdiction of the High Court under section 561-A, observed at page 322—

> "In these cases the order of the High Court sought to be reviewed had been passed on merits and they were sought to be reviewed on the ground that the conclusion arrived at by the court earlier was wrong. Such a re-hearing of the appeal or revision is hardly a matter for the exercise of inherent jurisdiction of the court in the interests of justice. It is well-nigh impossible to satisfy an unsuccessful party that an order of the court is a correct one. The interests of justice, therefore, require that such applications for review be not entertained."

It was held that where a matter has been fully heard and the decision has been arrived at on merits, no application for review shall be entertained even in the case of a revision or reference.

The question as to the power of the High Court to review its appellate Judgment under section 561-A, Criminal Procedure Code came for consideration before

(1) A.I.R. 1959 All. 315.

the Supreme Court in *U. J. S. Chopra* v. *State of Bombay* (1). At page 648 of the judgment it was stated that—

> "Even while exercising its revisional powers under section 439 the High Court exercises any of the powers conferred on a court of appeal by sections 423, 426, 427 and 428 and it is in effect an exercise of the appellate jurisdiction, though exercised in the manner indicated therein. This principle of finality of criminal judgments, therefore, would equally apply when the High Court is exercising its revisional jurisdiction. Once such a judgment has been pronounced by the High Court, either in exercise of its appellate or its revisional jurisdiction, no review or revision can be entertained against that judgment, and there is no provision in the Criminal Procedure Code which would enable even the High Court to review the same or to exercise revisional jurisdiction over the same."

Again referring to the question of the finality of the appellate judgment of the High Court, their Lordships stated at page 654 thus:

> "Once, therefore, the judgment of the High Court replaces that of the lower court there is no question which can ever arise of the exercise by the High Court of its revisional powers under section 439(1) of the Criminal Procedure Code and the proper procedure, therefore, if the High Court thought it fit either *suo motu* or on the application of the interested party, to issue notice of enhancement of sentence, is to issue the said notice before the hearing of the appeal is concluded and the judgment of the High Court in appeal is pronounced."

(1) A.I.R. 1955 S.C. 633.

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The above observations leave no room for doubt that once the High Court has pronounced its judgment according to law, the judgment of the trial court merges in that of the High Court and it becomes final and irrevocable. The High Court would not then be entitled to review its judgment in purported exercise of its inherent jurisdiction.

It was argued that the observations made by the Supreme Court in *Chopra's* case (1) were *obiter dicta* and are not binding on us We think there is no force in this contention. In the first place, we do not regard the observations to be *obiter dicta* because we think that for the decision of the question which arose for consideration by their Lordships it was necessary for them to decide whether an order made by the High Court in exercise of its appellate jurisdiction was a proper order. It was urged before the Supreme Court that the High Court had inherent jurisdiction under section 561-A. Criminal Procedure Code to re-hear the matter on merits. In this context it was necessary to decide whether the High Court could re-open the case after it had disposed of the appeal and pronounced its judgment. In any case the observations of their Lordships of the Supreme Court would amount to a declaration of law by the Supreme Court within the meaning of Article 141 of the Constitution and, as such it would be binding on all courts in India.

The Andhra Pradesh High Court in *Venkata Raiydu v State* (2) has held that the principle of finality attaching to the appellate judgments of the High Court constitutes a bar to the purported exercise by the High Court of its inherent power to review its judgment. We are in respectful agreement with that view.

The learned counsel has not been able to cite a single case before us in which the High Court has exercised

(1) A.I.R. 1955 S.C. 633 (2) A.I.R. 1957 A.P. 240

its inherent power to review its appellate judgment by admitting fresh evidence and allowing the accused to introduce fresh material in the case. One may no doubt conceive of cases where the High Court may exercise its inherent jurisdiction to make consequential amendments in its order, for example to correct a clerical mistake in its judgment; to re-hear an appeal where it has been disposed of without affording an opportunity to the appellant or his counsel to be heard; where there has been no hearing in accordance with law or where upon the face of it the judgment does not clearly express the intention of the court. Instances like these stand on an entirely different footing because in such cases the court is not exercising its power of review There the inherent power of the court is being exercised to further the ends of justice and the court is not called upon to re-assess the evidence or to introduce fresh material on the record for the purpose of deciding the matter.

We, therefore, hold that these applications are not maintainable and they are accordingly dismissed.

The order passed by this Court staying execution of the sentence of death of Sadhu Singh applicant is vacated.

Application dismissed.

CRIMINAL REVISION

Before Mr. Justice Uniyal and Mr. Justice Ramabhadran

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May, 12

KHALIL AHMAD

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Question of citizenship—*it can be decided by the Central Government or the law courts—What is the effect of cl. (iii) of Sch. III of the Citizenship Rules of 1956—If a person who does not obtain a permit and stays on in India beyond the date mentioned in the visa contravenes s. 14 of the Foreigners Act,* 1946.

The revision petition has been filed by Khalil Ahmad against his conviction and sentence under s. 14 of the Foreigners Act, 1946, and his contention was that he was not a 'foreigner' within the meaning of the Foreigners Act, and that he was an Indian citizen at the time when he went to Pakistan within the meaning of Art. 5 of the Constitution of India. Questions arising in the case were referred to the Division Bench which after considering them in detail,

Held, (i) that the question of citizenship can only be decided by the Central Government in accordance with s. 9(2) of the Citizenship Act and as there was no decision of the Central Government in the present case that the applicant was not a citizen of India, he could not be prosecuted and convicted under s. 14 of the Foreigners' Act.

(ii), that the rules of evidence framed in cl. (iii) of Schedule III of the Citizenship Rules, 1956 are not violative of Art. 19 of the Constitution of India and the Central Government has power to determine the question of citizenship in accordance with those rules.

(iii), that if a foreigner does not obtain a permit as required by para 7 of the Foreigners Order, 1946 he renders himself liable under s. 14 of the Foreigners Act.

Case-law discussed.

Criminal Revision no. 959 of 1960, from an order of R. CHANDRA, Sessions Judge, Bareilly, dated 3rd June, 1960.

The facts appear in the judgment.

Bashir Ahmad, for the applicant.

Harish Chandra Pati Tripathi and *M. M. Chaturvedi*, for the State.

The judgment of the Court was delivered by—

UNIYAL, J.:—The following questions have been referred to us for decision:

(1) Whether the question of citizenship can be decided by the Central Government or by the law Courts?

(2) What is the effect of clause (iii) of Schedule III of the Citizenship Rules of 1956?

(3) Does a person contravene section 14 of the Foreigners Act if he does not obtain a permit and stays in India beyond the date mentioned in the visa?

The above reference has arisen out of a revision petition filed by Khalil Ahmad against his conviction and sentence under section 14 of the Foreigners Act, 1946. The applicant was born in India of Indian parents who were domiciled in the country. He left India for Pakistan in March, 1950 after the Constitution had come into force. Thereafter he arrived in India under a Pakistani Passport no. 09531, dated 9th January, 1953, bearing Indian visa no. 546 of Category 'C', dated 3rd January, 1957, issued by the Indian High Commissioner in Pakistan at Karachi. The visa was valid up till the 25th April, 1957. The applicant entered India on the 25th January, 1957, on the basis of the passport and the visa mentioned above. He, however, did not obtain any permit from the civil authorities and continued to stay in India even after the expiry of the period mentioned in the visa. He was, therefore, prosecuted for breach of paragraph 7 of the Foreigners Order, 1948 and

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convicted under section 14 of the Foreigners Act. He preferred an appeal from his conviction and sentence to the Sessions Judge of Bareilly which was dismissed. Thereupon he moved this Court by means of a revision application and contended that he was not a 'foreigner' within the meaning of the Foreigners Act. His case was that he was an Indian citizen at the time when he went to Pakistan within the meaning of Article 5 of the Constitution.

In order to appreciate the arguments of the learned counsel it is necessary to set out the various provisions of the Constitution bearing on this matter.

Article 5 defines the persons who constitute citizens of India at the commencement of the Constitution. Article 5 is in these terms:

> "At the commencement of this Constitution every person who has his domicile in the territory of India, and
>
> (*a*) who was born in the territory of India; or
>
> (*b*) either of whose parents was born in the territory of India; or
>
> (*c*) who has been ordinarily resident in the territory of India for not less than five years immediately preceding such commencement, shall be a citizen of India."

Article 7 says that if a person had gone from the territory of India to the territory now included in Pakistan after 1st March, 1947, with the intention of migrating from India to Pakistan, he would lose his citizenship of India which might have accrued to him by reason of Article 5 of the Constitution. Thus Articles 5 and 7 have to be read together. Article 7 is really in the

nature of a proviso to Article 5. Article 9 is of some importance and reads thus—

> "No person shall be a citizen of India by virtue of Article 5, or be deemed to be a citizen of India by virtue of Article 6 or Article 8, if he has voluntarily acquired the citizenship of any foreign State."

Article 11 is as follows:

> "Nothing in the foregoing provisions of this Part (Part II) shall derogate from the power of Parliament to make any provision with respect to the acquisition and termination of citizenship and all other matters relating to citizenship."

It would appear that the purport of Article 9 is that if a person has voluntarily acquired the citizenship of any Foreign State he would not be considered or deemed to be a citizen of Indian by birth or by reason of domicile. Article 9 refers to the voluntary acquisition of the citizenship of any foreign State before the commencement of the Constitution and not after the coming into force of the Constitution. In other words, a person of Indian domicile would be deemed to be a foreigner if he has acquired the citizenship of a foreign State before the 26th January, 1950, the date of the commencement of the Constitution.

We are here concerned with a case where the applicant is said to have acquired citizenship of a foreign State subsequent to the coming into force of the Constitution and the question immediately arises whether a person who was a citizen of India on the 26th January, 1950, would cease to be so if he has subsequently voluntarily acquired citizenship of a foreign State.

In order to resolve this question we have to examine the scope and ambit of Article 11 of the Constitution

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which says that notwithstanding the provisions of Articles 5 and 9 of the Constitution, the Parliament shall have the power to make any provision with respect to the acquisition and termination of citizenship and all other matters relating to citizenship. Entry 17 of List I of Schedule VII empowers the Parliament to make laws relating to citizenship, naturalisation and aliens. The contents of entry 17 have to be read in the light of the power conferred by Article 11. It was in pursuance of this power that the Parliament enacted the Citizenship Act (no. 57 of 1955). Sections 3 to 7 of this Act make provision for the acquisition of citizenship by various modes, namely, citizenship by birth, citizenship by descent, citizenship by registration, citizenship by naturalisation and citizenship by incorporation of territory. Section 8 of the Citizenship Act provides for the mode of renunciation of citizenship by an Indian citizen. Section 9 provides as to the circumstances which may result in the termination of citizenship. Section 9 is in these terms—

> "9. (1) Any citizen of India who by naturalisation, registration or otherwise voluntarily acquires, or has at any time between the 26th January, 1950 and the commencement of this Act, voluntarily acquired, the citizenship of another country, shall, upon such acquisition or, as the case may be, such commencement, cease to be a citizen of India;
>
> Provided that nothing in this sub-section shall apply to a citizen of India who, during any war in which India may be engaged, voluntarily acquires the citizenship of another country, unless the Central Government otherwise directs.
>
> (2) If any question arises as to where, when or how any person has acquired citizenship of another country, it shall be determined by such authority,

in such manner, and having regard to such rules of evidence, as may be prescribed in this behalf."

Section 18 of the Citizenship Act gives power to the Central Government to make rules to carry out the purposes of the Act. Clause (*h*) of sub-section (1) of section 18 says such rules may provide for the authority to determine the question of acquisition of citizenship of another country, the procedure to be followed by such authority and rules of evidence relating to such cases. The Central Government have framed rule 30 of the Citizenship Rules of 1956 specifying the authority to determine the question as to where, when or how any person has acquired the citizenship of another country. Rule 30 says—

"30. (1) If any question arises as to where, when or how a person has acquired the citizenship of another country, the authority to determine such question shall, for purposes of section 9(2); be the Central Government.

(2) The Central Government shall, in determining any such question, have due regard to the rules of evidence specified in Schedule III."

Now a person who is citizen of a particular country may abandon that citizenship and acquire the citizenship of another country. In that event a question may arise whether he has relinquished the citizenship of his country of domicile. It is obvious that this matter will need to be decided on the basis of some rules of evidence and by such authority as may be prescribed for the purpose. It was to provide for a situation of this character that clause 3 of Schedule III of the Citizenship Rules was framed by the Central Government under the rule-making power conferred on it by section 18, read with rule 30 of the Citizenship Rules.

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The learned counsel argued that clause 3 of Schedule III framed under rule 30 of the Citizenship Act, was arbitrary and constituted unreasonable abridgment of the fundamental rights of a citizen. Clause 3 of Schedule III reads—

> "The fact that a citizen of India has obtained on any date a passport from the Government of any other country shall be conclusive proof of his having voluntarily acquired citizenship of that country before that date."

Under section 9(2) of the Citizenship Act when any dispute arises as to whether a person has acquired citizenship of another country, it shall be determined by such authority, in such manner and having regard to such rules of evidence, as may be prescribed in this behalf. Rule 30 states that the Central Government shall be the authority to determine such questions for purposes of section 9(2) of the Act. The rules of evidence which should guide the Central Government in arriving at the conclusion as to whether a person has or has not voluntarily acquired the citizenship of another country are laid down in Schedule III. Paragraph 4 of Schedule III reads—

> "In determining whether a citizen of India has or has not voluntarily acquired citizenship of any other country, the Central Government may take the following circumstances into consideration, namely—
>
> (*a*) Whether the person has migrated to that country with the intention of making it his permanent home;
>
> (*b*) Whether he has in fact taken up permanent residence in that country; and
>
> (*c*) Any other circumstances relevant to the purpose."

Paragraph 5 reads—

"Notwithstanding anything contained in paragraph 4, a citizen of India shall be deemed to have voluntarily acquired citizenship of Pakistan—

(a) if he has migrated to Pakistan with the intention of making it his permanent home; or

(b) if he has obtained any certificate of domicile for Pakistan or declared himself to be a citizen of Pakistan or of Pakistan domicile; or

(c) if he has applied for and obtained a right, title or interest in evacuee property in Pakistan; or

(d) if he has obtained a temporary permit for entry into India from Pakistan."

The learned Advocate-General pointed out that the question of acquisition of citizenship of another country is a question of status and that Article 11 of the Constitution gave very wide powers to Parliament for making the law with respect to the acquisition and termination of citizenship and all other matters relating to citizenship. The power thus given to Parliament was not controlled by any provisions of the Constitution. Article 11 expressly provided that notwithstanding any provision in Part II of the Constitution, the Parliament shall have the power to make law for the acquisition and termination of citizenship. It cannot, therefore, be in doubt that Parliament was competent to provide for the termination of citizenship by enacting section 9 of the Citizenship Act. As we have mentioned earlier, item 17 of List I of Schedule VII embraces the power conferred on the Parliament to make law relating to citizenship, naturalisation and aliens. It follows, therefore, that the Parliament is also competent to make

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rules of evidence for purposes of determining whether a person has ceased to be an Indian citizen or not

Schedule III of the Citizenship Rules lays down the rules of evidence in regard to this matter. If a person is not a citizen of India he cannot call in aid the provisions of Part III of the Constitution. Article 19 applies only to the case of Indian citizens and if a person's nationality is in dispute he cannot claim protection of the fundamental rights, for it would be a contradiction in terms to hold that a person though not a citizen of India is nevertheless entitled to all the privileges and rights available to an Indian citizen. If a question arises whether the person concerned has acquired the citizenship of another country, that question has got to be resolved with the assistance of the rules of evidence contained in clause 3 of Schedule III of the Citizenship Rules. We are clearly of opinion that Article 19 of the Constitution has no application to such a case. We are supported in this view by the Bombay High Court in *State* v. *Sharif Bhai* (1) and *Daud Ali Arif* v. *Deputy Commissioner of Police* (2). We were referred to the case of *Sharafat Ali Khan* v. *State of Uttar Pradesh* (3). In that case BROOME, J. held that clause 3 of Schedule III of the Citizenship Rules appears to give rise to arbitrary and unreasonable abridgment of the fundamental rights guaranteed to all Indian citizens and is, therefore, by virtue of Article 13(2) of the Constitution, null and void. He relied on the view adopted by the Andhra Pradesh High Court in *Mohammad Khan* v. *Government of Andhra Pradesh* (4).

We may point out that the view expressed by the Andhra Pradesh High Court in *Mohammad Khan's* case (4) has been dissented from by the Madras, Rajasthan, Calcutta and Bombay High Courts, vide

(1) A.I.R. 1959 Bom. 193.
(2) 1960 A.L.J. 461.
(3) A.I.R. 1958 Cal. 558.
(4) A.I.R. 1957 A.P. 1047.

Mohammad Usman v. *State of Madras* (1), *State* v. *Sharif Bhai* (2), *Ghasirul Hasan* v *State of Rajasthan* (3) and *Daud Ali Arif* v. *Deputy Commissioner of Police* (4).

It seems to as that in *Sharafat Ali Khan's* case (5), BROOME, J. proceeded on the presumption that the person concerned was an Indian citizen and, as such, entitled to the protection guaranteed under Article 19 of the Constitution. It was admitted in that case that the person concerned was a minor when he went to Pakistan and, as such, had no legal capacity to acquire domicile different to that of his guardian. On that finding it could legitimately be held that he had not lost his Indian nationality. The case, therefore, cannot be of any help to the applicant in the present case and is clearly distinguishable.

It was next contended that under section 9(2), read with rule 30 of the Citizenship Rules the proper authority to determine the question as to the nationality of the applicant was the Central Government and that the applicant could not have been prosecuted without first obtaining the decision of the Central Government under section 9(2) of the Citizenship Act. In our view the objection raised by the applicant is sound.

Schedule III of the Citizenship Rules lays down rules of evidence which should guide the Central Government in determining the question whether a person has voluntarily acquired citizenship of another country. It may be safely assumed that the Government is in the best position to decide the matter as the question of citizenship is, broadly speaking, political in nature. Consequently the prosecution of the applicant appears to us to be premature and unjustified. The Central Government have not yet made any decision as to his citizenship and he could not, therefore, be convicted on the ground that he is a 'foreigner'.

(1) A.I.R. 1961 Mad. 139.
(2) A.I.R. 1959 Bom. 192.
(3) A.I.R. 1955 Raj. 172.
(4) A.I.R. 1958 Cal. 365
(5) 1950 A.L.J. 461.

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It was further contended that the Government of India had not recognised the citizenship or nationality law of Pakistan as being an enactment in force in that country and that, therefore, the applicant could not be declared as a citizen of Pakistan. Reliance was sought to be placed on the terms 'citizen' and 'nationality law' as defined in section 2 of the Citizenship Act and it was said that he could not be held to be a citizen of Pakistan.

Clauses (*b*) and (*c*) of section 2(1) of the Citizenship Act are as follows:

> "(*b*) 'Citizen' in relation to a country specified in the First Schedule means a person who under the citizenship or nationality law for the time being in force in that country is a citizen or national of that country.
>
> (*c*) 'Citizenship' or 'Nationality law' in relation to a country specified in the First Schedule means an enactment of the legislature of that country which at the request of the Government of that country the Central Government may by notification in the official *Gazette* have declared to be an enactment making provision for the citizenship or nationality of that country."

It was pointed out that the Central Government had not issued any notification in the official *Gazette* declaring the Pakistan Citizenship Act, 1951, to be an enactment making provision for the citizenship or nationality of Pakistan and that, therefore, the applicant could not be said to have voluntarily acquired the citizenship of Pakistan.

There is an obvious fallacy in the argument. The definition of 'citizen' or "citizenship or nationality law" given in section 2(*b*) and (*c*) of the Citizenship Act, is for the purpose of placing a restriction on the

foreigner who wants to get himself registered as an Indian citizen. This is made clear by the proviso added to section 5 of the Citizenship Act which runs as follows:

"5. (1) Subject to the provisions of this section and such conditions and restrictions as may be prescribed, the prescribed authority, may, on application made in this behalf, register as a citizen of India any person who is not already such citizen by virtue of the Constitution or by virtue of any of the other provisions of this Act, and belongs to any of the following categories:

(a) .....

(b) .....

(c) .....

(d) .....

(e) Persons of full age and capacity who are citizens of a country specified in the First Schedule.

Provided that in prescribing the conditions and restrictions subject to which persons of any such country may be registered as citizens of India under this clause, the Central Government shall have due regard to the conditions subject to which citizens of India, may by law or practice of that country, become citizens of that country by registration."

The First Schedule has been framed for the purpose of section 5(1) (c) of the Citizenship Act and it is in this context that clauses (b) and (c) of section 2 have to be interpreted. The proviso to section 5(1) of the Citizenship Act makes it abundantly clear that the intention of the legislature was that persons of a country mentioned in Schedule I would be qualified to be registered as citizens of India if there was a corresponding law in that country permitting citizens of India to become citizens

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of that country by registration. It was to give effect to the principle of reciprocity that the definition of the words 'citizen' and 'citizenship or nationality law' was expressed in those terms.

The learned counsel cited the case of *Aslam Khan* v. *Fazal Haq Khan* (1) in support of his argument that the Pakistan Citizenship Act, 1951, does not satisfy the requirements of citizenship or nationality law laid down in the definition in section 2(1) (*c*) of the Citizenship Act. In that case it was observed by the learned Judges that the Central Government had not notified in the official *Gazette* declaring the Pakistan Citizenship Act to be an enactment making provision for the citizenship or nationality of Pakistan. From this it was concluded by the learned Judges that a person coming to India from Pakistan on the basis of a passport and visa could not be recognised as a citizen of Pakistan as in their view there was no law relating to the acquisition of citizenship of Pakistan so far as the Indian Government was concerned. With great respect we fail to appreciate the reasoning on which the decision in *Aslam Khan's* case was based. It appears that the attention of the Court was not invited to the fact that the First Schedule has been framed for the purpose of implementing the provisions of section 5(1) of the Citizenship Act. It seems to us that the observations made in *Aslam Khan's* case are too wide of the mark, and we respectfully dissent from the view expressed therein.

It was next urged that the applicant was a 'natural born British subject' as defined in sub-section (1) (*b*) of section 1 of the British Nationality and Status of Aliens Act, 1914 (4 and 5 Geo. V Ch. XVII), and that the mere fact that he had obtained a passport from Pakistan for entering India could not make him a foreigner.

(1) A.I.R. 1959 All. 79.

It becomes necessary to examine the validity of this argument by reference to certain provisions of the Foreigners Act as amended from time to time. The word 'foreigner' was defined by section 2(*a*) of the Foreigners Act (XXXI of 1946) as amended by Act XXXVIII of 1947, as follows:

> '"Foreigner" means a person who—
>
> (i) is not a natural born British subject as defined in sub-sections (1) and (2) of section 1 of the British Nationality and Status of Aliens Act 1914, or
>
> (ii) has not been granted a certificate of naturalisation as a British subject under any law for the time being in force in India, or
>
> (iii) is not the ruler or subject of an acceding state, or
>
> (iv) is not a native of the Assam tribal areas—
>
> Provided that any British subject, who under any law for the time being in force in India causes to be a British subject, shall be deemed to be a foreigner.'

It is not in dispute that the applicant was born in India during British suzerainty and was, as such, a natural born British subject. The definition of the word "foreigner" was amended by the Adaptation of Laws Order, 1950 when the Constitution of India came into operation and clauses (iii) and (iv) of the proviso of the original definition were deleted. In their place a new clause was added to the following effect:

> "Is not a citizen of India."

In spite of this amendment by the Adaptation of Laws Order natural born British subjects and persons holding certificates of naturalisation as British subjects under any law for the time being in force were not regarded as foreigners. The position was, however,

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fundamentally altered when in the year 1957 section 2(*a*) of the Foreigners Act, 1946, was amended by Act XI of 1957 and the word "foreigner" was defined as "a person who is not a citizen of India". This amendment came into force with effect from 18th November, 1957. It is thus clear that persons who before the date on which Act XI of 1957 came into force, were entitled as natural born British subjects to claim that they were not foreigners were deemed to be foreigners unless it was proved that they were citizens of India.

It has not been challenged that the Parliament has plenary powers and could amend the law so as to declare a natural born British subject a foreigner if he was not a citizen of India. It would, therefore, follow that after the coming into force of the Foreigners Act (XI of 1957) a person who is not a citizen of India would be deemed to be a foreigner. It is said that the status of the applicant as a natural born British subject could not be affected by the Foreigners Amendment Act of 1957. The argument is wholly without substance. As from the 15th day of August, 1947, when two independent dominions of India and Pakistan were brought into existence by the Indian Independence Act, the suzerainty of the British Crown came to an end. Section 7(1) (*a*) of the Independence Act reads—

> "His Majesty's Government in the United Kingdom have no responsibility as respects the Government of any of the territories which immediately before that date were included in British India."

Proviso (*b*) of sub-section (2) of section 8 of that Act says that—

> "nothing in this sub-section shall be construed as continuing in force of an order after the appointed date any form of control by His Majesty's Government in the United Kingdom over the powers

of the new Dominion or any provinces or other parts thereof."

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Thus India ceased to be a 'Dependency' of the British Empire by the passing of the Indian Independence Act; 1947, and all control by His Majesty's Government in the United Kingdom over the powers of the new dominion of India came to an end. It is well established that when a sovereign power cedes a territory by treaty or otherwise to another State the inhabitants of the ceded territory cannot retain the allegiance and nationality of their former ruler.

The case of *Emperor* v. *Jagardeo* (1) illustrates the point made above. There a certain territory in which the applicant of that case resided was ceded to the Maharaja of Banaras by the British Government. The applicant came to live in Bombay in connection with his business. He contended that he was a 'natural born British subject' and, as such, was not a 'foreigner' under the Foreigners Act (III of 1864) as amended by Act III of 1915. This contention was repelled by the Bombay High Court and it was held that a relinquishment of the government of a territory was not only relinquishment of the right to the soil or territory but also of the rights over the inhabitants of the country. It was held that—

> "When a sovereign by treaty relinquishes his claim to the allegiance of the inhabitants of specified territories, it becomes a question of fact whether a particular individual remained after the cession an inhabitant of the specified territory and became thereby a citizen of the State into which it passed as an integral part. In no case has it been held that any inhabitant of the ceded or separated territory has the right to remain an inhabitant of it, and at the same time to retain the allegiance and nationality of the State which ceded or permitted the separation."

(1) A.I.R. 1925 Bom. 489.

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It is evident that when the British Crown relinquished the government of the territory of India and created two separate dominions of India and Pakistan, persons residing in the respective Dominions ceased to retain the allegiance and nationality of the British Crown which had transferred all its rights over the territory of India to the said two Dominions. It follows, therefore, that the applicant could not claim to be a natural born British subject as from the 15th of August, 1947.

It was also contended that the Pakistani passport on the basis of which he entered India was not a document of title and, as such, could not affect his original status as an Indian citizen. It was said that the mere fact that the applicant had obtained a Pakistani passport should not be considered as evidence of his having voluntarily acquired citizenship of Pakistan. Now it seems to us clear that under the Pakistan Citizenship Act 1951, the Pakistan Government would not have issued a passport to the applicant unless they were satisfied that he was a Pakistani citizen. This aspect of the case is important because a citizen of India living in Pakistan did not have obtain a Pakistani passport and a visa to visit India while a Pakistani national would have to do so. In this view of the matter the issue of a Pakistani passport would be presumptive evidence of the fact that the holder thereof owed allegiance to the Pakistan Government.

In *Joyce* v. *Director of Public Instruction* (1) an American citizen who had resided in British territory for a number of years applied for and obtained a British passport describing himself as a British subject by birth and stating that he required it for the purpose of holiday touring in Germany and other European countries. During the continuance of the passport issued to him the Second World War broke out and he helped the Nazi Government in delivering broadcast talks in

(1) 1946 A.C. 347.

English hostile to Great Britain. He was prosecuted and convicted of treason. It was contended on his behalf that he was an American citizen and, as such, the passport issued to him did not affect his status as an American citizen and that he could not be prosecuted and convicted for treason on the footing that he was a British citizen. Lord JOWITT, the Lord Chancellor, repelled the contention and observed as follows:

> "The essential fact is that he got the passport and I now examine this fact. The actual passport issued to the appellant has not been produced, but its contents have been duly proved. The terms of a passport are familiar. It is thus described by Lord ALVERSTONE, C. J., in *R.* v. *Braillesford* (1):
>
> > "It is a document issued in the name of the sovereign on the responsibility of a Minister of the Crown to a named individual intended to be presented to the governments of foreign nations and to be used for that individual's protection as a British subject in foreign countries."
>
> By its terms it requests and requires in the name of His Majesty all those whom it may concern to allow the bearer to pass freely without let and hindrance and to afford him every assistance and protection of which he may stand in need."

The Lord Chancellor pointed out that—

> "In these circumstances I am clearly of opinion that so long as he holds the passport . . . . . if he is adherent to the King's enemies in the realm or elsewhere is itself an act of treason. There is one other aspect of this part of the case with which I must deal. It is said that there is nothing to prevent an alien from withdrawing from his allegi-

(1) (1905) 2 K.B. 780.

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ance when he leaves the realm. I do not dissent from this as a general proposition. It is possible that he may do so even though he has obtained a passport. But that is a hypothetical case. Here there was no suggestion that the appellant had surrendered his passport or taken any other overt steps to withdraw from his allegiance."

The observations of the House of Lords quoted above fully apply to the present case. The applicant here had not surrendered his passport nor taken any overt step to withdraw from his allegiance to the Pakistan Government. If he was so minded he could have applied for being registered as an Indian citizen. He, however, chose to sojourn in India on the basis of the Pakistani passport and at no time directly or indirectly indicated his intention to renounce his Pakistani citizenship. We are, therefore, of opinion that the applicant by obtaining a Pakistani passport had declared his allegiance to the Pakistan Government and could be considered as a foreigner.

Lastly, it was contended that paragraph 7 of the Foreigners Order made in pursuance of section 3 of the Foreigners Act was a piece of delegated legislation and was, therefore, invalid. It is said that the Parliament had delegated unbridled and unguided power to the Central Government.

In order to appreciate this contention it is necessary to refer to section 3 of the Foreigners Act which says that the Central Government may by order make provision either generally or with respect to all foreigners or with respect to any particular foreigner, for prohibiting, regulating or restricting entry of foreigners into India, or their departure therefrom or their presence or continued presence therein. In sub-section (2) of section 3 it is laid down that orders made

under this section may provide, *inter alia*, that the foreigner shall not depart from India or shall depart only at such times and by such route and subject to the observance of such conditions of departure as may be prescribed, and further that he shall not remain in India, or in any prescribed area therein, and shall comply with such conditions as may be prescribed or specified imposing any restrictions on his movement, etc. It would thus appear that the legislature has clearly specified the matters in respect of which orders may be made under this section by the Central Government. It cannot, therefore, be said that an unguided power has been conferred on the Central Government. It is only a piece of conditional legislation and, consequently the power conferred on the Central Government cannot be said to be in excess of section 3 of the Act.

Paragraph 7 of the Foreigners Order, 1948, stands as follows:

> " Restriction on sojourn in India—
>
> Every foreigner who enters India on the authority of a visa issued in pursuance of the Indian Passports Act, 1920 (XXXIV of 1920) shall obtain from the Registration Officer having jurisdiction either at the place at which the said foreigner enters India, or if he enters India otherwise than on the authority of transit visa or passport as defined in the Registration of Foreigners Act, 1939, at the place in which he resides in India, a permit indicating the period during which he is authorised to remain in India, and shall, unless the period stated in the permit is extended by the Central Government, depart from India before the expiry of the said period."

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Section 14 of the Foreigners Act provides that persons contravening the provisions of the Act or of any order made thereunder or any direction given in pursuance of the Act or such Order, would be liable to be punished with imprisonment for a term which may extend to five years. Paragraph 7 of the Foreigners Order has been made to regulate and restrict the movements of foreigners sojourning in India, in the interest of the security of the State and also to safeguard the personal safety of the foreigner concerned. We find no force in the contention that paragraph 7 of the Foreigners Order is invalid.

It was also suggested that Rule 6 of the Registration of Foreigners Rules, 1939, does not provide for obtaining a permit by a foreigner from the Registration Officer. Section 2(*b*) of the Registration of Foreigners Rules, 1939, defines "certificate of registration" as meaning a certificate of registration issued in pursuance of rule 6. Clause (g) of that section defines "Registration Officer" as meaning a Registration Officer appointed by the Central Government under rule 3.

Rule 6(1)(*a*) of the Registration of Foreigners Rules, 1939, says that a registration report shall be presented by a foreigner who is present in India on the date on which these rules come into force, within fifteen days of the said date, to the Registration Officer of the district in which his address in India is situated; and if on the said date, and for a period of fourteen days thereafter, the foreigner is absent from that district, to the Registration Officer of the district in which the foreigner is for the time being present. Sub-rule (2) of rule 3 says that every foreigner presenting a registration report shall furnish to the Registration Officer such information as may be in his possession for the purpose of satisfying the said officer as to the accuracy of the particulars specified therein and shall, on being required so to do, sign the registration report in the presence of

the said officer and shall thereupon be entitled to receive from the said officer a certificate of registration in Part III of Form A, or Part II of Form D, as the case may be.

The certificate of registration issued to a foreigner in Part III of Form A requires that when he is about to depart from India he shall produce his certificate of registration before the Registration Officer of the district in which his registered address is situated, and obtain from him an endorsement to the effect that the departure report has been made, and also surrender his certificate so endorsed to the Registration Officer of the place from which he proposes to leave India.

Rule 5 of the Registration of Foreigners Rules makes it incumbent on every foreigner entering India to present in person to the appropriate Registration Officer prescribed by rule 6 a Registration Report of his arrival or presence, as the case may be, in India.

The foregoing provisions of the registration of Foreigners Rules leave no room for doubt that under the Registration of Foreigners Act and the rules framed thereunder, a foreigner is required to inform the Registration Officer of his presence in India and obtain a certificate of registration from that officer, in accordance with rule 6. He is further required to surrender his certificate of registration immediately before his departure from India in accordance with rule 15 and obtain an endorsement from the Registration Officer to that effect. The purpose for which the certificate of registration is issued in respect of a foreigner is to regulate his movements within the district in which the registration certificate was granted, and also to restrict his stay within the period specified in the visa issued to him.

It is true that there is no specific rule for obtaining a " permit " by a foreigner from the Registration Officer, but it may be implied from the fact that every foreigner

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entering India is required to present in person to the Registration Officer a registration report of his arrival in India, on the basis of which he is granted a certificate of registration duly endorsed by the Registration Officer. This certificate of registration is nothing else than a "permit" issued to the foreigner indicating the date of his arrival and the period during which he is permitted to stay in the country. If a foreigner contravenes any of the directions contained in the certificate of registration he renders himself liable to the penalties prescribed in section 14 of the Foreigners Act. It seems to us clear that paragraph 7 of the Foreigners Order is violated by a foreigner if he does not comply with the conditions mentioned in the certificate of registration and fails to depart from India within the period mentioned in the said certificate.

Our answer to queston no. 1, therefore, is that the question of citizenship can only be decided by the Central Government in accordance with section 9(2) of the Citizenship Act. We further hold that there being no decision of the Central Government in the present case that the applicant was not a citizen of India, he could not be prosecuted and convicted under section 14 of the Foreigners Act.

Our answer to the second question is that the rules of evidence framed in clause 3 of Schedule III of the Citizenship Rules, 1956, are not violative of Article 19 of the Constitution and the Central Government has power to determine the question of citizenship in accordance with those rules.

Our answer to the third question is that if a foreigner does not obtain a permit as required by paragraph 7 of the Foreigners Order, 1946, he renders himself liable under section 14 of the Foreigners Act.

The case shall be returned to the court concerned with the above opinion.

Questions answered accordingly.